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PRACTICE ACT

BEING AN ACT ENTITLED

"AN ACT TO REGULATE PROCEEDINGS IN CIVIL CASES IN THE COURTS OF JUSTICE IN THIS STATE," PASSED APRIL 29, 1851, AND AMENDED MAY 18, 1853; MAY 18, 1854; APRIL 28, MAY 4, AND MAY 7, 1855; FEBRUARY 20, 1857; MARCH 24, AND APRIL 15, 1858; FEBRUARY 21, MARCH 28, APRIL 2, AND APRIL 12, 1859; APRIL 28, 1860.

ALSO

"*An Act concerning the Courts of Justice of this State, and Judicial Officers,*" *passed May* 19, 1853; *and also,* "*An Act concerning Forcible Entries and Unlawful Detainers,*" *passed April* 22, 1850.

THIRD EDITION.

BY HENRY J. LABATT,

COUNSELOR AT LAW, SAN FRANCISCO, CAL.

"Law Practice is imperfect at the best."—H. W. WARNER.

SAN FRANCISCO:

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1860.

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INTRODUCTION

TO THE THIRD EDITION.

The former editions of the annotated Practice Act having been well received by the profession in the State, it has been deemed necessary to issue a third, carefully revised —as the former editions are out of print—in which are incorporated the amendments to the Act by the Legislatures of 1859 and 1860.

Practice decisions rendered by the Supreme Court of this State and New York, to the latest date, have been also supplied.

There are annexed the "Act concerning the Courts of Justice of this State, and Judicial Officers," as also the "Act concerning Forcible Entries and Unlawful Detainers," with annotations thereto of decisions rendered, and other acts incidental to the practice.

The figures in brackets, succeeding the section number, denote the years in which the section has been amended, and the amendments of 1859 and 1860 are in italic.

HENRY J. LABATT.

San Francisco, May, 1860.

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SUPREME COURT.

Hon. STEPHEN J. FIELD, Chief Justice, ...Term expires, 1864.

Hon. JOSEPH G. BALDWIN, Associate Justice,.....Term expires, 1862.

Hon. W. W. COPE, Associate Justice,.....Term expires, 1866.

Hon. THOMAS H. WILLIAMS,.....Attorney General.

CHARLES S. FAIRFAX, Esq.,.....Clerk.

DAVID T. BAGLEY, Esq.,.....Deputy Clerk.

JOHN B. HARMON, Esq., } .....Reporters.
DAVID T. BAGLEY, Esq., }

W. C. STRATTON, Esq.,.....Dep. State Librarian.

The Terms of this Court are holden at the Capital of the State, (City of Sacramento) on the first Monday in the months of January, April, July and October.

JUDICIAL DISTRICTS OF THE STATE.

DISTRICT.	JUDGE.	TERM.	RESIDENCE.	COUNTIES.
First,	Hon. Benjamin Hayes,	1865	Los Angeles,	Los Angeles, San Bernardino and San Diego
Second,	Hon. Joaquin Carillo,	1865	Santa Barbara,	San Luis Obispo and Santa Barbara
Third,	Hon. Sam'l B. McKee,	1865	Oakland,	Alameda, Monterey, Santa Clara and Santa Cruz
Fourth,	Hon. John S. Hager,	1862	San Francisco,	Northern part of San Francisco
Fifth,	Hon. Charles M. Creaner,	1865	Stockton,	San Joaquin and Tuolumne
Sixth,	Hon. John H. McKune,	1865	Sacramento,	Sacramento
Seventh,	Hon. E. W. McKinstry,	1865	Benicia,	Contra Costa, Marin, Mendocino, Napa, Solano and Sonoma
Eighth,	Hon. Wm. R. Turner,	1865	Trinidad,	Klamath, Del Norte and Humboldt
Ninth,	Hon. Wm. P. Daingerfield,	1866	Shasta,	Shasta, Siskiyou and Trinity
Tenth,	Hon. Sam'l M. Bliss,	1865	Marysville,	Sutter and Yuba
Eleventh,	Hon. Benj. F. Myres,	1865	Auburn,	El Dorado, Placer and Yolo
Twelfth,	Hon. Edward Norton,	1861	San Francisco,	Southern part of San Francisco and San Mateo
Thirteenth,	Hon. Edward Burke,	1861	Mariposa,	Frezno, Mariposa, Merced, Stanislaus, Tulare and Buena Vista
Fourteenth,	Hon. Niles Searls,	1865	Nevada,	Nevada
Fifteenth,	Hon. W. T. Sexton,	1863	Oroville,	Colusi, Tehama and Butte
Sixteenth,	Hon. James H. Hardy,	1866	Mok'lmne Hill,	Amador and Calaveras
Seventeenth,	Hon. Robert H. Taylor,	1866	Downieville,	Sierra and Plumas

TERMS OF THE COURTS OF RECORD IN THIS STATE.

COUNTY.	District.	DISTRICT COURTS.	COUNTY COURTS. 1st Monday in Jan., March, May, July, Sept., and Nov., unless otherwise fixed by law.	COURTS OF SESSIONS. 1st Monday Feb., April, June, Aug., Oct., and Dec., unless otherwise fixed by law.	PROBATE COURTS. 4th Monday of each month, unless otherwise fixed by law.
Alameda,	3	3d Monday in July, Nov. and March	3d Monday of above months	See County Court	See County Court
Amador,	16	1st Monday in March, June, Sept. and Dec	3d Mon. Jan., Mar., May, July, Sept,	See County Court	
Buena Vista,	18	(Attached to Tulare County)	and Nov.]..[Sept. and 4th Mon. Nov.	[July and Oct.	[Aug.; 2 Mon. Dec.
Butte,	15	1st Monday in March, July and Nov	1st Mon. March and June, 2d Mon.	2d Mon. Feb.; 3d Mon. Apr.,	4 Mon. Feb. and May; 3 Mon.
Calaveras,	16	1st Monday in Feb., May, August and Nov	1 Mon. Jan., Ap. & July; 3 Mon. Oct.	See County Court	See County Court
			[and Nov.		
Colusa,	15	2d Monday in January; 1st Mond. May and Sept	2d Mon. Jan., Mar., May, July, Sept.	2d Mon. Mar., July and Nov.	See County Court
Contra Costa,	7	1st Monday in January, May and Sept	3 Mon. May; 1 M Aug Nov. & Feb.	See County Court	
Del Norte,	8	1st Monday in May, August and Nov	1 Mon. Apr.; 3 M. July & Oct	See County Court	
El Dorado,	11	2d Monday in Feb. and May; 3d Mond. Aug. and Nov.	1st Mon. Jan., May and Sept	1st Mon. Mar., July and Nov.	
Frezno,	13	1st Monday in March, July and Nov	[and Dec.		
Humboldt,	8	1st Monday in March, June and Sept	2d Mon. Feb., April, June, Aug., Oct	See County Court	See County Court
Klamath,	8	1st Monday in April, July and Oct	[June, Aug. and Oct.	[July, Sept and Nov.	
Los Angeles,	1	3d Monday in March, July and Nov	2d Mon. Feb. and 3d Mon. April.	4th Mon. Feb., 1 Mon. May,	
Marin,	7	1st Monday in March, July and Nov	1st Mon. Feb., May, Aug and Nov	See County Court	See County Court
Mariposa,	13	2d Monday in March, July and Nov			[Dec.
Mendocino,	7	3d Monday in March, July and Nov	1st Mon. Mar., June, Sept. and Dec.	See County Court	3 Mon. Mar., June, Sept. and
Merced,	13	3d Monday in February, June and Oct			1 M. Jan. Mar. May, Jul. Sep.
Monterey,	3	2d Monday in December, April and August	See Court of Sessions		See Court of Sess'ns. [& Nov.
Napa,	7	1st Monday in February, June and Oct	2d Mon. Mar., July, and 1 Mon. Nov.	1st Mon. Apr., Sept. and Dec.	3d Mon. Mar., July, 2d Mon.
Nevada,	14	1st Monday in Feb., Apr., June, Aug., Oct. and Dec.	1st Mon. Jan., May and Sept	1st Mon. Mar., July and Nov.	[Nov.
Placer,	15	2d Monday in Jan., April, July; 3d Mond. Oct	2d Mon. Sep., 4 Mon. Jan. and May	See County Court	
Plumas,	17	2d Monday in April, July, Oct. and Jan	1st Mon. Jan., May and Sept	See County Court	
Sacramento,	6	1st Monday in Feb., Apr., June, Aug., Oct. and Dec.	1st Mon. Jan., April, June & Sept.	See County Court	
S. Bernardino,	1	3d Monday in Feb., June and Oct	1st Mon. Jan., Mar., May, July, Sep	1st Mon. Feb., June and Oct.	
San Diego,	1	2d Monday in Jan., May and Sept	[and Nov.		
S. Francisco,	4	1st Monday in Feb., Apr., June, Aug., Oct. and Dec.			3d Mon. Jan., Mar., May, Ju-
	12	1st Monday in Jan., Mar., May, July, Sept. and Nov.			ly, Sept. and Nov
San Joaquin,	5	1st Monday in Jan., April, August and Dec	1st Mon. Feb. and Oct.; 2 Mon. May.	See County Court [Dec.	
S. L. Obispo,	12	2d Monday in Jan., April, July and Oct	3d Mon. Mar., June, Sept. and Dec.	4th Mon. Mar., June, Sept. &	3d Wednesday each month.
San Mateo,	12	3d Monday in April, August and Dec	1st Mon. March, July and Nov	Wedn. after County Court	Tues. after County Court
Santa Barbara,	2	1st Monday in March, June, Sept. and Dec	1st Mon. Feb., May, Aug. & Nov.	2d Mon. Feb., May, Aug. and	3d Wednesday each month.
Santa Clara,	3	1st Monday in May, Sept. and Jan	1st Mon. Feb. June and Oct	See County Court [Nov.	See County Court
Santa Cruz,	3	3d Monday in April, August and Dec	4th Mon. March, July and Nov	See County Court	
Shasta,	9	2d Monday in March, June and Nov	1st Mon. Jan., May and Sept	See County Court	
Sierra,	17	1st Mond. Mar.; 2d Mon. May and Aug.; 1 Mon. Nov	1st Mon. April, Aug., Oct. and Dec.	See County Court	See County Court
Siskiyou,	9	3d Monday in Jan.; 1st Mon. May and 3d Mon Sept.	1 Mon. Jan., Apr., Oct.; 3 Mon. July	See County Court	See County Court
Solano,	7	3d Monday in Jan., May and Sept	3d Mon. April, Aug. and Dec	See County Court	
Sonoma,	7	3d Monday in Feb., June and Oct	1st Mon. Feb., May, Aug. and Nov.	1st Mon. Feb., May, Aug. and	See County Court
Stanislaus,	13	2d Monday in Feb., June and Oct		[Nov.	
Sutter,	10	2d Monday in March, June, Sept. and Dec	1st Mon. Mar., June, Sept. and Dec.		
Tehama,	15	1st Monday in Feb., June and Oct	1st Mon. April, Aug. and Dec	See County Court	
Trinity,	9	2d Monday in April, August and Dec		2d Mon. Feb., May, Aug. and	
Tulare,	18	4th Monday in Feb., June and Oct		[Nov.	
Tuolumne,	5	1st Monday in March, July and Nov	1st Mon. Jan., May and Sept	See County Court	
Yolo,	10	3d Monday in March; 2d Mon. Aug.; 3d Mond. Dec.	1st Mon. Jan., May and Sept	1st Mon. Apr., July and Dec.	2d Mon. Jan., March, May,
Yuba,	10	3d Monday in Jan., April, July and Oct	1st Mon. Jan., April, July and Oct.	3 Mo. Feb., May, Aug. & Nov.	[July, Sept. and Nov.

AN ACT

TO REGULATE PROCEEDINGS IN CIVIL CASES IN THE COURTS OF JUSTICE OF THIS STATE.

AS PASSED APRIL 29, 1851, AND AMENDED MAY 18, 1853; MAY 18, 1854; APRIL 28, MAY 4 AND MAY 7, 1855; FEBRUARY 20, 1857; MARCH 24, APRIL 15, 1858; FEBRUARY 21, MARCH 28, APRIL 2 AND 12, 1859; APRIL 28, 1860.

1. The practice act is prospective, and not retrospective in its operation. *People* v. *Hays*, 4 Cal. 127.

2. This act applies, as a general rule, as well to cases in equity as to actions at law. *Riddle* v. *Baker*, Cal. April T. 1859; *Goodwin* v. *Hammond*, ib.; *Duff* v. *Fisher*, Cal. April T. 1860.

The People of the State of California represented in Senate and Assembly, do enact as follows:

TITLE I.

OF THE FORM OF CIVIL ACTIONS, AND OF THE PARTIES THERETO.

1. There shall be in this state but one form of civil action, for the enforcement or protection of private rights, and the redress or prevention of private wrongs.

1. "There shall be but one form of civil action," extends only to the *form* and to the pleadings, dispensing with the technicalities in the statement of the cause of action and defense, without regard to ancient forms, whether of assumpsit, trespass, or ejectment, etc. *De Witt* v. *Hays*, 2 Cal. 463.

2. Although the forms of civil actions are similar, yet the distinction of common law in actions is preserved, and if a plain, speedy and adequate remedy exists at law, the party will not be allowed to resort to equity pleadings. *White* v. *Fratt*, Cal. April T. 1859; *Cole* v. *Reynolds*, 18 N. Y. 74.

3. We still recognize the use of common counts as proper in the practice in this state under the act, yet we have never gone so far as to recognize a jumble of all the causes of action in one count. *Buckingham* v. *Waters*, Cal. Oct. T. 1859.

4. The blending of an action at law with one in equity, is admissible under our system of practice, but to prevent confusion, and preserve the simplicity and directness requisite in the averments of a complaint in an action at law, the grounds of equity interposition should be stated subsequently to, and distinct from, those upon which the judgment at law is sought. *Natoma Water Co.* v. *Clarkin*, Cal. Oct. T. 1859.

5. The form of an action is determined by the matter set forth in the complaint, and not by the name which the plaintiff may give it. *Cornes* v. *Harris*, 1 Coms. 223.

6. There is no longer a distinction between suits at law and in equity, either in the form of the pleadings or the jurisdiction of the court. *General Mutual Insurance Co.* v. *Benson*, 5 Duer, 168.

7. Abolishing the forms of pleading does not disturb the common law rule as to the order of introducing matter of defense. *Van Buskirk* v. *Roberts*, 14 How. Pr. 61.

2. In such action the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

1. A person named as defendant, and not served with process, is not a party to the action. *Robinson* v. *Frost*, 14 Barb. 536; *East River Bank* v. *Cutting*, 1 Bosworth, 636.

3. When a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made, stating distinctly and plainly the question of fact to be tried; and such order shall be the only authority necessary for a trial.

4. [1854, 1855.*] Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in this act; but in suits brought by the assignee of an account, unliquidated demand, or thing in action not arising out of contract, assigned subsequently to the first day of July, 1854, the assignor shall not be a witness on behalf of the plaintiff.

1. The assignor cannot be a witness for the assignee. *Jones* v. *Post*, 4 Cal. 14; *Griffin* v. *Alsop*, ib. 406; *Allen* v. *Citizens' Steam Navigation Co.*, 6 Cal. 400.

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* Statutes of 1855, 303.

2. The words, "assigned to Ryan and Callaghan," and signed, "Jon. Nutt," is a good and sufficient assignment. *Ryan* v. *Maddux*, 6 Cal. 247.

3. A chose in action arising out of a tort, is not assignable, and the assignor is a necessary party plaintiff. *Oliver* v. *Walsh*, 6 Cal. 456.

4. The objection to a witness need not be only in a suit brought by the assignee. A substantial and a formal assignee stand alike on the same ground. *Adams* v. *Haskell*, 8 Cal. 306.

5. The assignor of a claim is incompetent as a witness in favor of the claim, when his assignee is a formal party to the record, and equally so, when the suit is prosecuted for the immediate benefit of his assignee, though not a party. Ib.

6. An agreement to pay a certain amount of money to a defendant, if he would withdraw his defense to a suit, is assignable; and such assignment gives a right of action in the name of the assignee, and the assignor may be a competent witness. *Gray* v. *Garrison*, 9 Cal. 325.

7. Where T., the holder of a note made by C., which he did not wish to sue in his own name, delivered the same to K., taking from the latter his own note for the amount, payable at a future day, upon the understanding that K. should prosecute the note of C., and that if he should not succeed in the collection thereof, he was not to pay the note given by him to T., but that such note was then to be returned to him: held, that K. could not maintain an action on the note of C., he not being the real party in interest. *Killmore* v. *Culver*, 24 Barb. 656.

8. The assignee of a cause of action is entitled to judgment, although the assignment be without consideration, and a mere gift. *Richardson* v. *Mead*, 27 Barb. 178; *Mills* v. *Fox*, 4 E. D. Smith, 220.

9. A dormant partner is a necessary party to an action by the copartnership. *Secor* v. *Keller*, 4 Duer, 416.

10. An endorser of negotiable paper is not an assignor within the meaning of the act. *Anderson* v. *Busteed*, 5 Duer, 485.

11. Every action must be prosecuted in the name of the *real* party in interest. *Camden Bank* v. *Rodgers*, 4 How. Pr. 63.

12. In an action by the assignee of a claim, a demand existing prior to the assignment in favor of defendant and against the assignor, is unavailable as a counter claim. It must be pleaded as a defense. *Ferreira* v. *Depew*, 4 Abb. 131; *Dillaye* v. *Niles*, ib. 253.

13. This section is to be construed with reference to the principle of representation which prevailed in the doctrine of parties in chancery; and, as a general rule, if the defendant will be perfectly protected by responding to the plaintiff, and if there is no necessity or substantial equity in protecting the fund against the plaintiff himself, if recovered, the plaintiff may be regarded as the real party in interest, within the meaning of this section. *Myers* v. *Machado*, 6 Abbott, 198.

14. A complaint by an assignee, which, after setting out the chose in action upon which suit is brought, and stating that on such a day, etc., it was assigned by the payee to the plaintiff, alleges that it is the *property* of the assignor, is bad on demurrer that it does not state facts sufficient to constitute a cause of action, although the assignment stated was in trust, and the plaintiff alleges that he has possession of the note. *Palmer* v. *Smedley*, 6 Abbott, 205.

15. No formality is necessary to effect the transfer of a chose in action. Any transaction between the contracting parties, which indicates their intention to pass the beneficial interest in the instrument from one to the other, is sufficient for that purpose; a debt or claim may be assigned by parol as well as by writing. 2 Sto. Eq. sec. 1047: *Heath* v. *Hull*, 4 Taunt. 326; *Slaughter* v. *Faust*, 5 Blackf. 380; *Montgomery* v. *Dillingham*, 3 Sme. & M. 647; *Hastings* v. *McKinley*, 1 E. D. Smith, 273; *Clark* v. *Downing*, ib. 406; *James* v. *Chalmers*, 5 Sand. 52.

5. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense, existing at the time of, or before notice of the assignment: but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith, and upon good consideration before due.

1. If plaintiff was assignee in good faith, and demanded goods within a reasonable time, a notice of the assignment was not necessary to charge defendants, and if they deliver goods to an attaching creditor, it is at their own risk. *Morgan* v. *Lowe*, 5 Cal. 325.

2. The good faith of an asignment being questioned, evidence going to show a previous pledge of the fund is admissible. *McEwen* v. *Johnson*, 7 Cal. 258.

3. Where a negotiable promissory note, not yet due, is taken *bona fide*, as collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the original parties. *Payne* v. *Bensley*, 8 Cal. 260.

4. The possession of a bill, whether obtained before or after maturity, is *prima facie* evidence of ownership. The transfer, with or without value, confers upon the holder the right of action; and a consideration need not be proved, unless a defense is interposed which would otherwise preclude a recovery. *McCann* v. *Lewis*, 9 Cal. 246.

5. The assignee of a cause of action, assigned after action brought, is liable to the defendant for costs, if he (the assignee) proceed in the action after the assignment, and in such a case he takes the demand *cum onere*, and is liable for the costs which had accrued before, as well as those which arise after the assignment. *Miller v. Franklin*, 20 Wend. 630.

6. Where an insolvent having money in bank, makes an assignment for the benefit of his creditors, soon after which, but before notice, a bill held by the bank fell due and was charged in the account of the insolvent, held, that the assignee was entitled to recover it of the bank. *Beckwith* v. *Union Bank of New York*, 5 Selden, 211.

7. The admission of declarations of an assignor of a chose in action, made while he is the holder and before assignment, are evidence against his assignee, and all claiming under him. 2 Phill. Ev. (C. & H. Ed.) note 446, pp. 387, 644, 663; *Brown* v. *Magraw*, 12 Sme. & M. 267; *Grand Gulf Bank* v. *Wood*, ib. 482.

6. [1854.*] An executor or administrator, or trustee of an express

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* Statutes of 1854, 84.

trust, or a person expressly authorized by statute, may sue, without joining with him the person or persons for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another.

1. An attorney in fact does not hold the character of trustee, and is not a necessary party to a suit to represent the interest of a principal. *Powell* v. *Ross*, 4 Cal. 197.

2. Bonds taken in the name of the people of the state, for the benefit of others, should not necessarily be prosecuted in the name of the people, but in that of the party in interest. *Baker* v. *Bartol*, 7 Cal. 551.

3. An auctioneer doing business for others, but in his own name, is a trustee of an express trust. *Minturn* v. *Main*, 3 Seld. 220; *Bogart* v. *O'Regan*, 1 E. D. Smith, 590.

4. Also, mercantile factors or other agents. *Grinnell* v. *Schmidt*, 2 Sand. 706; 3 Code R. 19.

5. An assignee of a demand in trust to pay certain creditors of the assignor, and the balance to the assignor himself, may bring an action in the premises in his own name. *Lewis* v. *Graham*, 4 Abbott, 106.

6. An officer of a foreign corporation or company, who has authority to sue on their behalf, is a trustee of an express trust. *Myers* v. *Machado*, 6 Abbott, 198.

7. When a married woman is a party her husband shall be joined with her; except that,

1st. When the action concerns her separate property she may sue alone.

2d. When the action is between herself and her husband she may sue or be sued alone.

1. A wife cannot sue alone to recover the homestead; it is a joint estate, and both husband and wife must join in the action. *Poole* v. *Gerrard*, 6 Cal. 71.

2. If the wife is improperly joined, it must be taken advantage of by demurrer. *Tissot* v. *Throckmorton*, 6 Cal. 471.

3. In an action to recover real property, when the wife is the owner of the fee and the husband tenant by the courtesy initiate, the husband and wife may and should join in the action. *Ingraham* v. *Baldwin*, 12 Barb. 9.

4. The husband cannot sustain a joint action in the name of himself and wife, for both her services and his own. *Avogadro* v. *Bull*, 4 E. D. Smith, 384.

5. In an action to foreclose a mortgage executed by husband and wife on the lands of the wife, both should be sued. *Conde* v. *Shephard*, 4 How. Pr. 75; *Conde* v. *Nelson* 2 Code R. 58.

6. 1st. Sustained, as referring to property in the statute denoted separate property; it does not refer to rents accruing, etc. *Snyder* v. *Webb*, 3 Cal. 83.

7. The object is to take away the necessity of suing by *prochein ami*, and being a

remedial statute, must be beneficially construed. *Kashaw* v. *Kashaw*, 3 Cal. 312; *McKune* v. *McGarvey*, 6 Cal. 497; *Guttman* v. *Scannell*, 7 Cal. 455.

8. If a husband and wife be sued together, the wife may defend for her own right.

1. Where the defense of the wife is a special one, she can defend for her own right as well when sued jointly, as if the trial was separate. *Duprez* v. *Duprez*, 5 Cal. 387.

2. To enable her to defend in her own right, she must possess as defendant the rights of a *femme sole*, and be able to make as binding admissions in writing in the action, as other parties. *Alderson* v. *Bell*, 9 Cal. 315.

3. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made a party, she may file a separate answer. *Moss* v. *Warner*, 10 Cal. 296.

9. When an infant is a party, he shall appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof, or a county judge.

1. The taking judgment against an infant as for want of an answer, without appointing a guardian *ad litem*, is an irregularity, and the plaintiff's want of knowledge that the defendant is a minor will not serve to make the judgment regular. The judgment so taken will be set aside on motion and without imposing terms. *Kellogg* v. *Klock*, 2 Code R. 27.

10. The guardian shall be appointed as follows:

1st. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relative or friend of the infant.

2d. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons; if he be under the age of fourteen, or neglect so to apply, then upon the application of any other party to the action, or of a relative or friend to the infant.

1. Where the infant is plaintiff he must have a guardian appointed before the action is commenced. *Hill* v. *Thacter*, 2 Code R. 3.

11. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child; and a guardian for the injury or death of his ward.

12. All persons having an interest in the subject of the action, and

in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this act.

1. Different persons owning separate tenements, affected by a nuisance, may join in one action to obtain an injunction to restrain the continuance of it. *Peck* v. *Elder*, 3 Sand. 126.

13. Any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein.

See sections 527, 658.

1. The plaintiff in an ejectment suit may sue one or more defendants, and they may answer separately, or demand separate verdicts. *Winans* v. *Christy*, 4 Cal. 70.

2. An appeal does not lie from an order making a new party defendant. *Beck* v. *City of San Francisco*, 4 Cal. 375.

3. This section refers to cases in equity alone. *Garner* v. *Marshall*, 9 Cal. 268.

4. Where a sheriff is liable for the trespass or misfeasance of his deputy, both may be sued jointly for such wrongful act. *Waterbury* v. *Westervelt*, 5 Selden, 598.

5. Two persons severally liable, one upon a collateral and the other upon an original undertaking, cannot be joined in one action. *Phalen* v. *Dingee*, 4 E. D. Smith, 379.

6. When several defendants are sued on a joint liability, there can only be a joint recovery and judgment; and no judgment can be entered by plaintiff, until all the defendants served have had the full time to answer. *Jacques* v. *Greenwood*, 1 Abbott, 230.

14. Of the parties to the action, those who are united in interest shall be joined as plaintiffs, or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.

1. The provisions of this section sustained. *Von Schmidt* v. *Huntington*, 1 Cal. 55; *Bouton* v. *City of Brooklyn*, 15 Barb. 375; *Kirk* v. *Young*, 2 Abbott, 453.

2. In an action against defendants jointly indebted, where one only is served, a several judgment may be entered against him. *Hirshfield* v. *Franklin*, 6 Cal. 607.

3. This provision is designed to provide for a class of cases which occurs in equity, and is a mere recognition of a rule administered by courts of equity, and not to break in upon any rule of the common law. *Andrews* v. *Mokelumne Hill Co.*, 7 Cal. 330.

4. All the parties having a part interest in the subject matter should be joined as plaintiffs, but the defect must be taken advantage of by answer or apportionment of

damages, where it does not appear on the face of the complaint. *Whitney* v. *Stark*, 8 Cal. 514.

5. In this state, all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is therefore a necessary party to all suits affecting it. *Harwood* v. *Marye*, ib. 580.

6. When a party rents property from another, and there are adverse claims to the rent, he should file his bill against all adverse claimants therefor, and offer to pay the rents into court to abide the ultimate decision as to the party entitled to them. *McDevitt* v. *Sullivan*, ib. 592.

7. When two persons are made defendants and sued as joint makers of a promissory note, and one of them pleads infancy as his sole defense, they thenceforth cease to be "united in interest" in the meaning of those words. *Butler* v. *Morris*, 1 Bosworth, 329.

15. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff.

1. This section is in derogation of the old rule of common law, that one or all, and not any intermediate number, may be sued. *Stearns* v. *Aguirre*, 6 Cal. 183.

16. An action shall not abate by the death, or other disability of a party; or by the transfer of any interest therein, if the cause of action survive or continue. In case of the death or other disability of a party, the court on motion may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action may be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action.

1. The provisions of sections 16 and 17 sustained. *Brooks* v. *Hager*, 5 Cal. 281.

2. A suit abates by sentence to state's prison. *O'Brien* v. *Hagan*, 1 Duer, 664.

3. Leave of the court to continue an action under this section is always necessary. *Johnson* v. *Williams*, 2 Abbott, 229.

17. The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall order them to be brought in.

1. A court of equity will not permit litigation by piece-meal. The whole subject

matter and all the parties should be before it, and their respective claims determined once and forever. *Wilson* v. *Lassen*, 5 Cal. 114.

2. When a husband sues to recover a homestead, and the wife does not appear in the action, the court should order her to be brought in, so that a final decree may be binding upon them. *Marks* v. *Marsh*, 9 Cal. 96.

3. The right to demur was given to enable the court to carry out this provision. *Warner* v. "*Uncle Sam*," 9 Cal. 697.

TITLE II.

OF THE PLACE OF TRIAL OF CIVIL ACTIONS. (*a*)

18. Actions for the following causes shall be tried in the county in which the subject of the action or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in this act:

Stat 1851 P494

(*a*) STATUTES OF 1854, 153; WOOD'S DIGEST, 239, ART. 1378.

An Act relative to transferring actions and proceedings from one court to another court. Passed May 6, 1854.

1. If an action or proceeding is commenced or pending in a court as is hereinafter mentioned, and the judge or justice thereof is by law disqualified from acting as such, or if for any other cause the court orders the place of trial to be changed, it shall be transferred for trial to a court the parties may agree upon, by stipulation in writing, or made in open court and entered in the minutes; or, if they do not so agree, then to the nearest court where the like objection or cause for making the order does not exist, as follows:

1st. If in the district court, to another district court.

3d. If in a county court, to a district court, or some other county court.

4th. If in the probate court, to a district court, or some other probate court.

5th. If in a justice's court, to another justice's court in the same county.

2. When an order is made transferring an action or proceeding for trial, the clerk of the court, or justice of the peace, shall transmit the pleadings and papers therein to the clerk or justice of the court to which it has been transferred. If the transfer is made on the ground that a judge or justice is disqualified from acting, the cost and fees thereof, and of re-entering and filing the pleadings and papers anew, are to abide the event of the action or proceeding; in other cases they are to be paid by the party at whose instance the order is made.

1st. For the recovery of real property, or of an estate, or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property.

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3. The court to which an action or proceeding is transferred, shall have and exercise over the same the like jurisdiction as if it had been originally commenced therein, and may by order or execution enforce the judgment.

4. In an action or proceeding transferred from a probate court, or brought to recover the possession of lands or tenements, (excepting it be in a justice's court) after final judgment therein, the clerk of the court in which it is heard shall certify under his seal of office, and transmit to the court from whence it is transferred, a full transcript of the proceedings and judgment. The clerk receiving such transcript, shall docket and record the judgment in the records of his court, briefly designating it as a judgment transferred from ——— court, (naming the proper court).

5. On transferring causes, the following and no other fees and costs shall be allowed to the clerks of the court: for transmitting the pleadings and papers of a cause, the sum of two dollars; for re-entering and filing the same pleadings and papers anew, three dollars; for certifying and remitting a transcript and judgment, when required to be done under this act, five dollars; for docketing and recording a transcript and judgment, when required to be done under this act, five dollars. The last two items may be taxed in favor of the successful party, and made a part of the judgment against the other party, or otherwise ordered paid, as the court hearing the action or proceeding may, by its order or judgment, direct.

6. If an action or proceeding is transferred to a justice's court, the justice receiving it shall, three days before he proceeds to the trial thereof, unless the parties stipulate, in writing, to waive such notice, cause therein a notice in writing to be served on the parties, which notice shall inform them of the time and place of trial; in other cases the action or proceeding shall proceed in the manner provided for by law in such actions or proceedings.

STATUTES OF 1855, 80; WOOD'S DIGEST, 250, ART. 1379.

An Act to provide for certifying and removing certain cases from the courts of this State to the United States Circuit Courts, and to remove by writ of error certain cases from the Supreme Court of this State to the Supreme Court of the United States. Passed April 9th, 1855.

1. If a suit be commenced in any court of this state, against an alien, or by a citizen of this state against a citizen of another state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court, and the defendant shall, at the time of entering his appearance in such a court of this state, file a petition for the removal of the cause for trial into the next circuit court of the United States, or district court of the United States, having the powers and jurisdiction of a circuit court, to be held in the district where the suit is

2d. For the partition of real property.

3d. For the foreclosure of a mortgage of real property.

1. Mining claims are real estate within the meaning of this act, and are governed by the provisions of this section. *Watts* v. *White*, Cal. April T. 1859.

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pending, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if bail was originally requisite therein, it shall then be the duty of such court of this state to accept the surety and proceed no further in the cause; and all subsequent proceedings which may be taken or had in such court, in contravention of the provisions of this section, shall be void and of no force or effect for any purpose whatsoever.

2. A final judgment or decree in any suit in the highest court of law or equity of this state in which a decision of the suit could be had, where is drawn in question the validity of a treaty or statute thereof, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under this state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such, their validity; or where is drawn in question the construction of any clause of the constitution of the United States, or of a treaty, or of a statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be removed by writ of error to, and be re-examined and reversed or affirmed in the supreme court of the United States, in the manner prescribed by the laws of the United States; and upon the issuance and service of such writ of error the chief justice or any judge of the court, rendering or passing the judgment or decree complained of, upon being applied to by the plaintiff in error, or his attorney, shall sign the requisite citation to the adverse party.

3. After a final judgment shall have been rendered in any suit in the highest court of this state, if the party against whom the decision may have been given, shall within ten days thereafter file notice, in writing, with the clerk, of his intention to remove the cause by writ of error, to the supreme court of the United States, and shall offer sufficient security, to be approved by the judge of the supreme court, or any district court of this state, for the prosecution of such writ of error, it shall be the duty of the said court in which such final judgment was rendered, or any judge thereof at chambers, to stay all proceedings for such time not exceeding four months, to be fixed by the said court or judge, as will be sufficient to enable such party to apply for and serve his writ of error in the mode prescribed by the laws of the United States, and upon the receipt of such writ of error, the clerk of the court in which the record may be, and to which the writ may be directed, shall make return thereto, and send up the record or a transcript, without the necessity of any other or further order or authority whatsoever.

4. If any judge, clerk, or other officer of any court of this state, shall knowingly and voluntarily act in contravention of the provisions of this act, he shall be deemed guilty of a misdemeanor in office and liable to impeachment and removal from office.

2. The party desiring a change of venue, should move the court to change the same, and then the court, in the proper case, has no discretion to refuse the motion. The court is not bound, however, of its own motion to change the venue; it is a privilege which may be waived by those entitled to it. Ib. *March* v. *Lowry*, 16 How. Pr. 41.

3. The county where the land or some part thereof is situated, is the proper place for trial to procure a decree that the conveyance of the land was fraudulent. *Wood* v. *Hollister*, 3 Abbott, 14.

19. Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

1st. For the recovery of a penalty or forfeiture imposed by statute; except, that when it is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream, and opposite to the place where the offense was committed.

2d. Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, does anything touching the duties of such officer.

1. It is upon trial that the objection to the venue must be raised, and the omission of the defendant to raise it then must be regarded as a waiver by which he is concluded. *Howland* v. *Willetts*, 5 Sand. 219.

2. 2d. This provision applies only to affirmative acts of the officer, by which, in the execution of process or otherwise, he interferes with the property or right of third persons, and not to mere omissions or neglect of official duty. *McMillan* v. *Richards*, 9 Cal. 365.

3. An action by the people and prosecuted by the attorney general is within the second subdivision of this section. *People* v. *Hayes*, 7 How. Pr. 248.

20. [1858.*] In all other cases, the action shall be tried in the county in which the defendants or any one of them may reside at the commencement of the action; or, if none of the defendants reside in the state, or, if residing in this state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint; and if any defendant or defendants may be about to depart from the state, such action may be tried in any county where either of the parties may reside, or service

* Statutes of 1858, 82.

be had, subject, however, to the power of the court to change the place of trial, as provided in this act.

1. Proceedings for the settlement of an estate and matters connected therewith, are not civil actions within the meaning of this Title II, so as to transfer them from one county to another. *Estate of Scott*, Cal. Jan. T. 1860.

2. In an action of the nature of quo warranto, the place of trial may properly be laid in any county of the state. *People* v. *Cook*, 6 How. Pr. 448.

21. The court may, on motion, change the place of trial in the following cases:

1st. When the county designated in the complaint is not the proper county.

2d. When there is reason to believe that an impartial trial cannot be had therein.

3d. When the convenience of witnesses and the ends of justice would be promoted by the change.

4th. When, from any cause, the judge is disqualified from acting in the action.

1. The granting of a change of venue is discretionary with the court below, subject to review only in cases of gross abuse. The affidavits should state sufficient facts to draw from the court its own inference as to the impartial trial. *Sloan* v. *Smith*, 3 Cal. 410.

2. After answer is filed, it is too late to raise objections as to venue in the county. *Tooms* v. *Randall*, 3 Cal. 438; *Reyes* v. *Sanford*, 5 ib. 117; *Pearkes* v. *Freer*, 9 Cal. 642; *Milligan* v. *Brophy*, 2 Code R. 118.

3. An appeal does not lie from an order granting a change of venue. *Juan* v. *Ingoldsby*, 6 Cal. 439.

4. In general, all the defendants should unite in making the motion. *Sailly* v. *Hutton*, 6 Wend. 508; *Legg* v. *Dorsheim*, 19 ib. 700; *Welling* v. *Sweet*, 1 How. Pr. 156; *Simmons* v. *McDougall*, 2 ib. 77.

5. There is no distinction between the terms "venue" and "place of trial." *Hinchman* v. *Butler*, 7 How. Pr. 462.

6. The demand may be made simultaneously with the service of an answer. *Mairs* v. *Remsen*, 3 Code R. 138.

7. 3d. In an affidavit for a motion to change the venue, the town as well as the county in which the witnesses reside must be stated. *Westbrook* v. *Merritt*, 1 How. Pr. 195; *Cook* v. *Finch*, 2 ib. 89; *Van Auken* v. *Stewart*, ib. 181.

8. In an affidavit for change of venue, the defendant must swear that *each* and every one of the witnesses above named; *all* and every one is bad. *Harris* v. *Clark*, 2 How. Pr. 82; *Mills* v. *Adsit*, ib. 83.

9. The venue will not be changed where there are witnesses at the place, as well as witnesses abroad, unless there is great necessity. *Austin* v. *Hinckley*, 13 How. Pr. 576.

10. An affidavit on a motion to change the place of trial is defective as to the materiality of the number of witnesses sworn to, if, by a fair construction, the testimony must be considered merely cumulative as to a part of the witnesses named. *Price* v. *Fort Edward Water Works Company*, 16 How. Pr. 51.

11. 4th. Where the judge is disqualified to sit in a cause by reason of consanguinity to one of the parties, he cannot sit even by consent of both, and if he do, the judgment will be vacated. *Oakley* v. *Aspinwall*, 3 Coms. 547.

TITLE III.

OF THE MANNER OF COMMENCING CIVIL ACTIONS. (*a*)

22. [1855.*] Civil actions in the district courts, and the

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* Statutes of 1855, 303.

(*a*) STATUTES OF 1854, 194; WOOD'S DIGEST, 249, ART. 1377.

An Act prescribing the manner of commencing and maintaining suits by or against counties. Passed May 11, 1854.

1. Suits against a county may be commenced in any court of that county, or in a district court of the judicial district in which such county is situated, in the same manner as suits against private persons; provided, that suits between counties shall be commenced in a court of competent jurisdiction, in any county not a party to such action.

2. In counties where there is a board of supervisors, having an acting chairman or president of such board, the original process and papers shall be served on such chairman or president, in the same manner as upon private persons; when there is no such chairman or president, they shall in like manner be served on the county judge of the county.

3. Immediately on the service of such process, it shall be the duty of the officer so served, to deliver such process, and all papers accompanying the same, to the district attorney for such county, whose duty it shall be to defend such cause or proceeding on the part of such county, until final judgment or compromise of such suit or proceeding.

4. Suits brought for or against a county, shall be by or in the name of such county.

STATUTES OF 1855, 56, §24; WOOD'S DIGEST, 696, ART. 3333.

24. No person shall sue a county in any case, or for any demand, unless he or she shall first present his or her claim or demand to the board of supervisors for allowance;

county courts, shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuing of a summons thereon. Provided, that after the filing of the complaint, a defendant in the action may appear, answer or demur, whether the summons has been issued or not, and such appearance, answer or demurrer, shall be deemed a waiver of summons.

1. Where a summons was issued and served in the morning, by which the defendants were cited to appear and answer the complaint in the court of First Instance at 10 o'clock, and judgment was rendered against them at 9 o'clock on the morning of the same day: held, that the judgment was irregular, and should be reversed, notwithstanding the court offered them permission to come in at a subsequent day, and make their defense. *Parker* v. *Shephard*, 1 Cal. 131.

2. In the absence of any statute to that effect, the state cannot be sued, and a judgment against it is erroneous. *People* v. *Talmage*, 6 Cal. 256; *Myers* v. *English*, 9 Cal. 341.

3. Where a complaint was filed on the thirtieth day of October, 1856, and no summons was issued thereon, and an amended complaint was filed on the twenty-sixth of January, 1857, and summons issued thereon, *held*, that the suit was not commenced until the issuing of the summons. *Green* v. *Jackson*, 10 Cal. 373.

4. Lodging the summons with the sheriff with intent that it should be served, is sufficient. *Gregory* v. *Wiener*, 1 Code R. N. S. 210.

23. [1860.*] The clerk shall indorse on the complaint, the day month and year the same is filed; and at any time *within one year* after the filing *of the same*, the plaintiff may have a summons issued.

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* Statutes of 1860, 000.

and if they fail or refuse to allow the same, or some part thereof, the party feeling aggrieved may sue the county: and if the party suing recover in the action more than said board allowed or offered to allow, said board shall allow the amount of the said judgment and costs as a just claim against the county; but if the party suing shall not recover more than the board shall have offered to allow him or her, then costs shall be recovered against him or her by the county. All claims for services and items of account of a similar nature, presented by any one person to the board of supervisors at any session of the board, shall be included in one account, and so considered by the board, unless by consent of the board.

1. The provisions of these statutes sustained. *Price* v. *Sacramento County*, 6 Cal. 255; *Gilman* v. *Contra Costa county*, ib. 676; 8 ib. 52; *County of Yuba* v. *Adams*, 7 Cal. 35; *McCann* v. *Sierra county*, ib. 121; *Placer county* v. *Astin*, 8 Cal. 303.

2. These statutes were passed to obviate the decision of *Hunsacker* v. *Borden*, 5 Cal. 288.

The summons shall be signed by the clerk, and directed to the defendant, and be issued under the seal of the court.

24. [1854, 1859.*] The summons shall state the parties to the action, the court in which it is brought, the county in which the complaint is filed, *the cause and general nature of the action*, and require the defendant to appear and answer the complaint within the time mentioned in the next section, after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him, according to the prayer of the complaint, briefly stating the sum *of money* or other relief demanded in the complaint; *and the clerk shall also indorse on the summons the names of the plaintiff's attorneys.*

1. If the summons be radically defective, it will not support a judgment by default. *The State* v. *Woodlief*, 2 Cal. 241.

2. A default admits every issuable fact stated in the complaint. *Harlan* v. *Smith*, 6 Cal. 173.

3. Where a defendant is sued as John, service was returned upon James, and judgment entered against J.: held, to amount to error, unless the person served is shown to be the person sued. *Sutter* v. *Cox*, 6 Cal. 415.

4. A judgment rendered upon irregular process can be attacked directly, but not collaterally. *Whitwell* v. *Barbier*, 7 Cal. 54; *Dorente* v. *Sullivan*, ib. 279.

5. In an action where the complaint alleges fraud, the summons must apprise the defendant that upon a failure to answer, the judgment will be taken against him for fraud, or it will not warrant a judgment by default embodying this charge. *Porter* v. *Herman*, 8 Cal. 619.

6. The court may permit a summons to be amended. *McDonald* v. *Walsh*, 5 Abbott, 69.

25. The time in which the summons shall require the defendant to answer the complaint, shall be as follows:

1st. If the defendant is served within the county in which the action is brought, ten days.

2d. If the defendant is served out of the county, but in the district in which the action is brought, twenty days.

3d. In all other cases, forty days.

1. A judgment will be reversed on appeal, rendered before the time of answering has expired. *Burt* v. *Scranton*, 1 Cal. 416.

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* Statutes of 1859, 39.

26. There shall also be inserted in the summons a notice, in substance as follows:

1st. In an action arising on contract for the recovery only of money or damages, that the plaintiff will take judgment for a sum specified therein, if the defendant fail to answer the complaint.

2d. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court for the relief demanded therein.

1. A mistake in the form of the summons is waived by the unconditional appearance of the defendant. *Dix* v. *Palmer*, 5 How. Pr. 233; 3 Code R. 214.

2. The cause of action stated in the complaint should control the form of the notice in the summons. *Voorhies* v. *Scofield*, 7 How. Pr. 51.

3. 2d. In an action for breach of promise of marriage, the summons should state that in default of answer, the party would apply to the court for the relief demanded. *Davis* v. *Bates*, 6 Abbott, 15.

27. In an action affecting the title to real property, the plaintiff, at the time of filing the complaint, or at any time afterwards, may file with the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby. From the time of filing only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

28. [1854, 1855, 1859, 1860.*] *The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy, or by a person specially appointed by him, or appointed by a judge of the court in which the action is brought, or by any white male citizen of the United States over twenty-one years of age, who is competent to be a witness on the trial of the action, except as hereinafter provided; a copy of the complaint, certified by the clerk, shall be served with the summons. When the summons is served by the sheriff or his deputy, it shall be returned with the certificate or affidavit of the officer, of its service, and of the service of the copy of the complaint, to the office of the clerk from which the summons issued.*

* Statutes of 1860, 000.

When the summons is served by any other person as before provided, it shall be returned to the office of the clerk from which it issued, with the affidavit of such person of its service, and of the service of a copy of the complaint. If there be more than one defendant in the action, and such defendants reside within the county, a copy of the complaint need be served on only one of the defendants.

1. The date of the return of the sheriff is sufficient, if defendant's attorney accepts service of the summons, and attached no date thereto. *Crane* v. *Brannan*, 3 Cal. 192.

2. The object of a summons is to bring a party into court, and if that object be attained, there can be no injury to him. *Smith* v. *Curtis*, 7 Cal. 584.

3. It is doubtful whether a person served by the wrong name, and who does not answer, can be bound by a judgment taken against him, by substituting the right name without notice. Ib.

4. Indorsed upon the complaint was the following: "We acknowledge service of the above complaint, and waive any other service and notice in the above entitled cause," and signed by the defendants: held, that the signatures should be accompanied with some evidence of their genuineness. *Alderson* v. *Bell*, 9 Cal, 315; *Litchfield* v. *Burwell*, 5 How. Pr. 341.

5. For want of such evidence, the judgment cannot be impeached collaterally. *Alderson* v. *Bell*, 9 Cal. 315.

6. The admission of service is not required to designate the place where the service was made. Ib.

7. The affidavit of service of summons must show affirmatively, compliance with all the requirements of the law. An affidavit which avers that affiant on the day named "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof, attached to a copy of the amended complaint filed in this action," is insufficient. *McMillan* v. *Reynolds*, 11 Cal. 372.

8. The objection that a summons at the commencement of a suit is not properly served, is not available in an answer or demurrer, but only on motion to set the proceedings aside. *Nones* v. *Hope Mutual Insurance Co.*, 5 How. Pr. 96.

9. A summons issued without mentioning the court from which it emanates, is defective. *Dix* v. *Palmer*, ib. 233; *James* v. *Kirkpatrick*, ib. 241.

10. The return of a sheriff or other person, of the service of summons, is not conclusive against a defendant. *Van Rennselaer* v. *Chadwick*, 7 How. Pr. 297; *Wallis* v. *Lott*, 15 ib. 567.

11. The admission of service by defendants residing out of the state, is ineffectual as the basis of any judicial proceeding *in personam* in this state. *Litchfield* v. *Burwell*, 5 How. Pr. 341.

12. Where the defendant is served with process by the plaintiff personally, he must take advantage of the irregularity by moving to set aside the proceedings before judgment, otherwise his motion will be too late. *Myers* v. *Overton*, 2 Abbott, 344.

29. [1854.*] The summons shall be served by delivering a copy thereof, as follows:

1st. If the suit be against a corporation, to the president or other head of the corporation, secretary, cashier, or managing agent thereof.

2d. If against a minor under the age of fourteen years, to such minor personally, and also to his father, mother or guardian; or if there be none within the state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed.

3d. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, to such guardian.

4th. In all other cases, to the defendant personally.

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1. Service of summons on Sunday would be a void service. *Field* v. *Park*, 20 Johns. 140.

2. Service of a summons upon an elector upon an election day, is a void service. *Hastings* v. *Farmer*, 4 Coms. 296; *Meeks* v. *Noxon*, 1 Abbott, 280; 11 How. Pr. 189; *Bierce* v. *Smith*, 2 Abbott, 411.

3. A complaint must be personally served, and such service must be by delivering it to the defendant, or offering it to him within his reach, or laying it down within his reach. *Van Rennselaer* v. *Petrie*, 2 How. Pr. 94.

4. 1st. Service against a corporation cannot be made upon a person in possession of the property, if not the president, head, secretary, or managing agent thereof. *Aiken* v. *Mariposa Quartz Rock Co.*, 6 Cal. 186.

5. Service upon "James Street, one of the proprietors of the company," is not a sufficient service upon a corporation, it not appearing that Street was president, or head of the corporation, or secretary, cashier or managing agent thereof. *O'Brien* v. *Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343.

6. A sheriff's return on the summons against a corporation, that he served the same on the president and secretary of the corporation, is *prima facie* evidence that the persons named in the return were the officers. *Rowe* v. *Table Mountain Co.*, 10 Cal. 441.

7. The return of a sheriff on a summons, that he had served it on one Pendleton, one of the partners and associates of the company, is *prima facie* evidence that Pendleton was such partner and associate. *Wilson* v. *Spring Hill Quartz Mining Co.*, 10 Cal. 445.

8. Where service is attempted in a mode different from the course of common law, the statute must be strictly complied with to give jurisdiction. *Jordan* v. *Giblin*, 12 Cal. 100.

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* Statutes of 1854, 84.

9. The managing agent must be one whose agency extends to all the transactions of the corporation. *Brewster* v. *Michigan Central R. R. Co.*, 5 How. Pr. 183.

10. 2d. If the minor resides out of the state, a copy of the summons must be deposited in the post office and directed to the minor in the same manner as if it were over the age of fourteen years. *Gray* v. *Palmer*, 9 Cal. 616.

11. 3d. An action cannot be brought against a lunatic, judicially declared of an unsound mind, without an application to the court. *Soverhill* v. *Dickson*, 5 How. Pr. 109.

12. Service of a summons on a lunatic should be made personally, and also on his guardian, if he has any. *Heller* v. *Heller*, 6 How. Pr. 194.

13. 4th. A judgment rendered without personal service is invalid. *Parsons* v. *Davis*, 3 Cal. 421.

14. A defendant having no defense to an action, cannot enjoin a judgment by default obtained on a return by the sheriff of service of process, on the ground that the return is false, and that he had no notice of the proceeding. *Gregory* v. *Ford*, Cal. Oct. T. 1859.

30. When the person on whom the service is to be made, resides out of the state, or has departed from the state; or cannot, after due diligence, be found within the state; or conceals himself to avoid the service of summons, and the fact shall appear by affidavit to the satisfaction of the court, or a judge thereof, or a county judge, and it shall in like manner appear, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action, such court or judge may grant an order that the service be made by the publication of the summons.

1. The affidavit of the plaintiff's attorney, showing that the defendant conceals himself to avoid service of process, is sufficient to obtain an order of publication. *Anderson* v. *Parker*, 6 Cal. 201.

2. An affidavit which avers the cause of action, and that defendant cannot after due diligence, be found in the state; that summons has been issued, but the sheriff cannot find him; that defendant's residence is in the county where the summons issued, and defendant still has a family residing in said county, is insufficient to authorize the court to appoint an attorney to represent such absent defendant. *Jordan* v. *Giblin*, 12 Cal. 100.

3. These facts must be stated positively, and not on information or belief. *Evertson* v. *Thomas*, 5 How. Pr. 45.

4. The time of the service of a copy of the complaint, when made by mail, is the time when it is mailed, not when it is received. *Peebles* v. *Rogers*, ib. 208; *Van Horne* v. *Montgomery*, ib. 238.

31. The order shall direct the publication to be made in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at

least once a week: provided, that publication against a defendant residing out of the state, or absent therefrom, shall not be less than three months. In case of publication, where the residence of a non-resident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint out of the state, shall be equivalent to publication and deposit in the post office. In either case, the service of the summons shall be deemed complete at the expiration of the time prescribed by the order for publication. In actions upon contracts for the direct payment of money, the court in its discretion may, instead of ordering publication, or may, after publication, appoint an attorney to appear for the non-resident, absent, or concealed defendant, and conduct the proceedings on his part.

1. The defendant has forty days time to answer, after the service of the summons is completed by three months publication. *Grewell* v. *Henderson*, 5 Cal. 465; *Tomlinson* v. *Van Vechten*, 6 How. Pr. 199; *Dykers* v. *Woodward*, 7 ib. 313.

2. A judgment by default, upon publication, may be opened at any time within six months thereafter. *Guy* v. *Ide*, 6 Cal. 99.

3. A judgment obtained by publication of summons against a defendant then out of the state in which the judgment is rendered, though it may be enforced against his property in that state, has no binding force *in personam*, and is a mere nullity when attempted to be enforced in another state. *Kane* v. *Cook*, 8 Cal. 449.

4. The court may appoint an attorney for an alleged concealed defendant, and a judgment against him will stand after six months have elapsed, unless this defendant file his bill to set aside the judgment on the ground of fraud, that he was not concealed. *Ware* v. *Robinson*, 9 Cal. 107.

5. A judgment rendered against a party who is absent from the state, upon publication of the summons thirty days only, is void for the want of jurisdiction of the person of the defendant. *Jordan* v. *Giblin*, 12 Cal. 100.

6. The order for publication should recite the summons in the action, or refer to it as being annexed, that it may appear that there was a summons, and for the purpose of identifying it. *Rawdon* v. *Corbin*, 3 How. Pr. 116; *Vernon* v. *Holbrook*, 5 ib. 3; *Everton* v. *Thomas*, 5 ib. 46.

7. The conditions must be strictly complied with to confer jurisdiction. *Hallett* v. *Righters*, 13 How. Pr. 43.

8. When the service is made out of the state, though made by a sheriff, it should be returned with his affidavit of service. *Thurston* v. *King*, 1 Abbott, 126; *Morrell* v. *Kimball*, 4 ib. 352.

9. If a summons served by publication misstates the day of the month on which the

complaint is filed, it is not an irregularity which affects the judgment; but if the defendant is misled by the error, he may be relieved on the merits. *Jacquerson* v. *Van Erben*, 2 Abbott, 315.

10. A delay to deposit in the post office a copy of the summons and complaint in foreclosure, pursuant to an order of publication, against an absent defendant, for fifteen days after the granting of the order, is an irregularity which affects the title, and a purchaser will be relieved from his purchase thereof. *Back* v. *Cruswell*, ib. 386.

11. When an order for service of summons upon a non-resident by publication is obtained, if personal service out of the state is effected, it is unnecessary to proceed to make publication, and to deposit the summons in the post office. A personal service takes the place of those steps. *Abrahams* v. *Mitchell*, 8 ib. 123.

32. Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1st. If the action be against the defendants jointly indebted upon a contract, he may proceed against the defendant served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendant served; or,

2d. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants.

1. This section supersedes the common law remedy of outlawry. *Stearns* v. *Aguirre*, 6 Cal. 183.

2. 1st. If the defendants are all served, though at different times, judgment against those first served cannot be entered by the clerk, even in default of answer. *Stearns* v. *Aguirre*, 7 Cal. 443.

3. This section does not apply to the foreclosure of mortgages on real estate. *Bowen* v. *May*, 12 Cal. 348.

4. 2d. If the defendants are severally as well as jointly liable, the plaintiff may proceed against those only who are served. *Stannard* v. *Mattice*, 7 How. Pr. 4.

33. Proof of the service of the summons shall be as follows:

1st. If served by the sheriff or his deputy, the affidavit or certificate of such sheriff or deputy; or,

2d. If by any other person, his affidavit thereof; or,

3d. In case of publication, the affidavit of the printer, or his foreman, or principal clerk, showing the same; and an affidavit of a

deposit of a copy of the summons in the post-office, if the same shall have been deposited; or,

4th. The written admission of the defendant.

1. The return of a summons may be amended. *Dorente* v. *Sullivan*, 7 Cal. 280.

2. 1st. The return of a sheriff or an affidavit of a person acting in his place, of the service of a summons, is not conclusive upon the defendant. *Van Rensselaer* v. *Chadwick*, 7 How. Pr. 297.

3. 3d. The affidavit of a clerk, not stating that he is the principal clerk, is sufficient if the affidavit shows him to be the only clerk. *Gray* v. *Palmer*, 9 Cal. 616.

4. 4th. The admission of the defendant, to be available in the action, should be accompanied with some evidence of the genuineness of the signature of the parties. *Alderson* v. *Bell*, 9 Cal. 315.

5. An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient. *Montgomery* v. *Tutt*, 11 Cal. 307.

34. In case of service otherwise than by publication, the certificate or affidavit shall state the time and place of the service.

1. The certificate of the sheriff need not show that the copy of the complaint served was certified by the clerk, as the presumption is, the clerk did his duty in a legal manner. *Curtis* v. *Herrick*, Cal. Oct. T. 1859.

2. The evidence of the place of service, if insufficient to authorize the rendition of the judgment, should have been taken advantage of, either upon appeal or on motion to vacate the judgment. *Pico* v. *Sunol*, 6 Cal. 294.

35. From the time of the service of the summons and copy of complaint in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him.

1. What constitutes an appearance? See section 523.

2. An appearance by attorney amounts to a waiver of service. *Suydam* v. *Pitcher*, 4 Cal. 280; *Mahoney* v. *Penman*, 4 Duer, 603.

3. Where a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as to cure the defect; nor does he waive his rights by answering after moving to dismiss, and motion overruled. *Deidesheimer* v. *Brown*, 8 Cal. 339; *Gray* v. *Hawes*, ib. 562.

4. A recital of an appearance in an answer of several defendants is never conclusive, and where the expression is general, it is confined to those parties who have been served with process. *Chester* v. *Miller*, Cal. Ap. T. 1859.

5. A voluntary and general appearance, besides being equivalent to a personal service of the summons, is a waiver of all defects in summons and previous proceedings.

Gardner v. *Teller*, 2 How. Pr. 241; *Hill* v. *Smith*, ib. 242; *Mulkins* v. *Clark*, 3 ib. 27; *Georgia Lumber Co.* v. *Strong*, ib. 246; *Dix* v. *Palmer*, 5 ib. 233, 3 Code R. 214; *Flynn* v. *Hudson R. R. R. Co.* 6 How. Pr. 308; *Webb* v. *Mott*, ib. 439; *Hewitt* v. *Howell*, 8 ib. 346; *Carpenter* v. *New York & New Haven R. R. Co.*, 11 ib. 481; *Hyde* v. *Patterson*, 1 Abbott, 248.

TITLE IV.

OF THE PLEADINGS IN CIVIL ACTIONS.

FOR INTERVENTION, SEE SECTIONS 659, ET. SEQ.

36. The pleadings are the formal allegations by the parties of their respective claims and defenses, for the judgment of the court.

1. Pleadings must be strongly taken against the pleader. *Chipman* v. *Emeric*, 5 Cal, 49; *Dickenson* v. *Maguire*, 9 Cal. 46; *Green* v. *Covillaud*, 10 ib. 317.

2. The mode of taking advantage of defective pleadings discussed. *White* v. *Joy*, 3 Kern. 83.

37. All the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act.

1. All rules of pleading that are merely technical, are abolished by this act. *Cobb* v. *West*, 4 Duer, 44.

38. [1855, 1860.*] The only *pleadings* on the part of the plaintiff shall be the complaint, demurrer, *or replication* to the defendant's answer, and the only *pleadings* on the part of the defendant shall be a demurrer *to the complaint, or a demurrer to the replication, or an answer to the complaint.* The demurrer or answer of the defendant, *and the demurrer or replication of the plaintiff*, shall be filed with the clerk, and a copy thereof served *on the adverse party*, or his attorney.

39. The complaint shall contain:

1st. The title of the action, specifying the name of the court and

* Statutes of 1860, 00.

the name of the county in which the action is brought, and the name of the parties to the action, plaintiff and defendant.

2d. A statement of the facts constituting the cause of action, in ordinary and concise language.

3d. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof shall be stated.

1. A plaintiff must be confined to the allegations in his complaint. *Branger* v. *Chevalier*, 9 Cal. 353.

2. When a pleader wishes to avail himself of a statutory privilege, or right given by particular facts, he must show the facts; those facts which the statute requires as the foundation of the right must be stated in the complaint. *Dye* v. *Dye*, 11 Cal. 163.

3. It is well where an action at law is blended with a demand for relief in equity, to commence the latter portion of the complaint which seeks the equitable relief, with the form "and for equitable relief pending the above action at law, the plaintiff further represents," or "for a further cause of action," &c. *Natoma Water Co.* v. *Clarkin*, Cal. Oct. T. 1859.

4. The pleader is required to state in ordinary and concise language, the facts constituting the cause of action, and the addition of unimportant words and phrases, which do not alter the meaning and lead to doubt and misapprehension, cannot change or impair the effect of the pleading. *Darst* v. *Rush*, Cal. July T. 1859.

5. Every fact which the plaintiff must prove to enable him to maintain his action, and which the defendant has the right to controvert in his answer, must be distinctly stated. *Jerome* v. *Stebbens*, Cal. Oct. T. 1859.

6. 1st. The statement of the place of trial (and name of the court) in the complaint is essential for many purposes of the action. *Merrill* v. *Grinnell*, 10 How. Pr. 31.

7. 2d. Where, on appeal, the complaint is so radically defective as not to authorize the judgment of the court below, a new trial may be granted, with leave to the plaintiff to amend his complaint, on such terms as the court below may deem just. *Sterling* v. *Hanson*, 1 Cal. 378.

8. One partner cannot sue another for a partnership transaction, without praying for an account and a settlement of the partnership transactions. *Russell* v. *Ford*, 2 Cal. 86; *Buckley* v. *Carlisle*, ib. 420; *Stone* v. *Fouse*, 3 Cal. 292; *Nugent* v. *Locke*, 4 Cal. 318; *Barnstead* v. *Empire Mining Co.* 5 Cal. 299.

9. If the complainant do not show a good cause of action, the judgment will be reversed though no objection be taken below. *Russell* v. *Ford*, 2 Cal. 86.

10. The statute requiring the complaint to contain a statement of the facts constituting a cause of action in ordinary and concise language, is only declaratory of the common law. *Godwin* v. *Stebbins*, 2 Cal. 103.

11. The allegations of ignorance in making the necessary averments, or of insufficient conduct in the prosecution of a former suit, do not constitute a ground for relief in chancery. *Barnett* v. *Kilburn*, 3 Cal. 327.

12. Where a bill disclosed that the same subject matter had been litigated between

the same parties in a prior suit, and that in said suit, the plaintiff in this suit had set up the same equity which he claims in this bill, the bill was ordered to be dismissed. Ib.

13. Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently H., a foreigner, built a house and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and the plaintiff prays an injunction, and damages for the occupation: Held, that the complaint sets forth no principle on which to base a claim. *O'Conner* v. *Corbitt*, 3 Cal. 370; *Ramirez* v. *Murray*, 5 Cal. 222.

14. Where the declaration was upon a note, and there was but one count, and the court found that the note was never given, but that the indebtedness of defendant to plaintiff was for merchandise sold: Held, that the finding was against the averment, and could not support the judgment. *Lewis* v. *Myers*, 3 Cal. 475.

15. A declaration is insufficient, which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice. *Lightstone* v. *Lawrence*, 4 Cal. 277.

16. In an action upon a promise to pay money, the complaint should aver consideration or indebtedness. *Shafer* v. *Bear River Co.*, 4 Cal. 294.

17. An amended complaint cannot be allowed to change the nature of an action. *Ramirez* v. *Murray*, 5 Cal. 222.

18. It is only necessary that the cause of indebtedness should be stated in such a manner as to apprise the defendant of the object of the suit. *Mulliken* v. *Hall*, 5 Cal. 245.

19. A complaint in ejectment need not aver title in the plaintiff, but an averment of prior possession and an ouster is sufficient. *Norris* v. *Russell*, 5 Cal. 249.

20. In an action of trespass against a sheriff, where he is declared against personally, and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy as such committed the trespass. *Poinsett* v. *Taylor*, 6 Cal. 78.

21. Objections to the form of a complaint cannot be raised for the first time in the appellate court. *Sutter* v. *Cox*, 6 Cal. 415.

22. In a complaint upon a bond by defendant in an action, either for the delivery of property replevied, or the release of property attached, the conditions precedent of the bond must be set forth in the complaint. *Palmer* v. *Melvin*, 6 Cal. 651; *Nickerson* v. *Chatterton*, 7 Cal. 568; *Williamson* v. *Blattan*, 9 Cal. 500.

23. A great necessity exists for a correct description of commercial paper in a complaint, so as to operate as a bar to any subsequent action to recover for the same cause. *Farmer* v. *Cram*, 7 Cal. 135.

24. In a bill in equity, filed to reach assets which are alleged to be fraudulently conveyed, it is not sufficient simply to aver that the conveyance was fraudulent, but facts and circumstances must be set out and shown, to sustain the theory of the bill. *Kinder* v. *Macy*, 7 Cal. 206.

25. In an action against an agent for not accounting, etc., a request to account and pay over must be alleged in the complaint, and proved at the trial. *Bushnell* v. *McCauley*, 7 Cal. 421.

26. The allegation that plaintiffs were the owners and in the possession of a mining

claim, is sufficient without setting out the particulars of the title. *Leigh Co.* v. *Independent Ditch Co.*, 8 Cal. 323.

27. Where the payment of a promissory note is by agreement of parties made conditional upon the payment, by the payee, of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made. *Rogers* v. *Cody*, 8 Cal. 324.

28. The averment in the complaint that the plaintiff is the owner of the note and mortgage is sufficient, without showing that he is the holder. *Rollins* v. *Forbes*, 10 Cal. 299.

29. The plaintiff must aver every fact necessary to show a right to recover, and every such necessary averment must be proved in some way. *Murdock* v. *Chenango Co. Mut. Ins. Co.*, 2 Coms. 210.

30. A complaint should state the facts of a case full enough to enable the court on proof or admission of the facts set forth, to grant the relief sought. *Tallman* v. *Green*, 3 Sand. 438.

31. When an action is founded on an agreement which would be void under the statute of frauds, unless in writing and signed by the party to be so charged, these facts, as constituting a part of the cause of action, must be averred in the complaint. *Thurman* v. *Stevens*, 2 Duer, 609; contra, *Leroy* v. *Shaw*, ib. 426.

32. The plaintiff is to state in his complaint the facts which constitute the cause of action, and nothing more. *Clark* v. *Harwood*, 8 How. Pr. 470.

33. It is not allowed to the plaintiff to set forth in different counts, several distinct causes of action for the same indebtedness. *Lackey* v. *Vanderbilt*, 10 How. Pr. 155; *Ford* v. *Mattice*, 14 ib. 91.

34. Several causes of action upon promissory notes may be united in the same complaint. They are not improperly united simply because they are not separately stated. *Dorman* v. *Kellum*, 14 How. Pr. 184.

35. In the complaint against the drawer of a bank check, or of a bill of exchange properly so called, it is necessary to aver either demand or notice to the drawer of nonpayment, or such facts, *e. g.*, want of funds in the bank, to excuse the demand and notice. *Shultz* v. *Dupuy*, 3 Abbott, 252.

36. A complaint upon a promissory note against maker and endorser, is not good if it fails to aver that the maker made and the endorser endorsed the note. *Price* v. *McClare*, 3 Abbott, 253.

37. A complaint seeking to charge the separate estate of a married woman with her debts is bad upon demurrer, if it does not set forth the property which it is sought to reach, and the nature of her interest in it. *Sexton* v. *Fleet*, 6 Abbott, 8.

38. An officer of a foreign bank brought an action in his own name, upon a bill of exchange belonging to the bank, and alleged in his complaint that he was such officer, and "duly authorised" to commence any and all proceedings at law, &c., on behalf of the bank, and that this action was brought on behalf of the bank; held, that the complaint was bad on demurrer for not setting forth the existence and terms of the foreign law, if any, under which the bank was organized, and an authority given plaintiff to sue on its behalf. An allegation that plaintiff was duly authorized to bring the action, is not an allegation of fact, but merely of a conclusion of law. *Myers* v. *Machado*, 6 Abbott, 198.

39. An officer of a foreign corporation or company, may maintain an action in his own name on behalf of his company, if his complaint states facts showing his authority to sue on their behalf. *Myers* v. *Machado*, 6 Abbott, 198.

40. In an action for false imprisonment, the particular instrumentality by which the plaintiff was deprived of his liberty should *not* be set out in the complaint. If the facts and circumstances of the arrest are averred in the complaint, the averments may be stricken out on motion. The evidence should not be pleaded. *Eddy* v. *Beach*, 7 Abbott, 17.

41. 3d. Although the prayer of a bill be inartificially framed, the court will, under the general prayer for relief, disregard mistakes, and grant such relief as will conform to the bill. *Truebody* v. *Jacobson*, 2 Cal. 269.

42. Objections to the prayer of the complaint cannot be taken by demurrer. *Rollins* v. *Forbes*, 10 Cal. 299.

40. [1859.*] The defendant may demur to the complaint within the time required in the summons to answer, when it appears upon the face thereof, either:

1st. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

2d. That the plaintiff has not legal capacity to sue; or,

3d. That there is another action pending between the same parties for the same cause; or,

4th. That there is a defect *or misjoinder* of parties, plaintiff or defendant; or,

5th. That several causes of action have been improperly united; or,

6th. That the complaint does not state facts sufficient to constitute a cause of action; or,

7th. *That the complaint is ambiguous, unintelligible or uncertain.*

1. When a demurrer is put in and overruled, and defendant answers, the answer is a waiver of demurrer. *De Boom* v. *Priestly*, 1 Cal. 206; *Pierce* v. *Minturn*, ib. 470; *Brooks* v. *Minturn*, ib. 481; *Gale* v. *Tuolumne Water Co.*; Cal. July T. 1859; *Harper* v. *Leal*, 10 How. Pr. 276.

2. When the declaration states a condition precedent, and fails to aver the performance, the defect must be taken advantage of by demurrer. *Happe* v. *Stout*, 2 Cal. 460.

3. Objections to a declaration when they arise from matters of form are not subjects of a demurrer. *Otero* v. *Bullard*, 3 Cal. 188; *Howell* v. *Frazer*, 1 Code R., N. S., 270.

4. An omission to allege delivery in a suit on bond, can be taken advantage of only by demurrer. *Garcia* v. *Satrustegui*, 4 Cal. 244.

5. If a demurrer be to the whole complaint, and any part of the complaint is good,

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* Statutes of 1859, 139.

the demurrer must be overruled. *Whiting* v. *Heslep*, 4 Cal. 327; *Cooper* v. *Clason*, 1 Code R., N. S., 347; *Butler* v. *Wood*, 10 How. Pr. 222; *Freeland* v. *McCullough*, 1 Denio, 414.

6. A judgment on demurrer is not a bar to a subsequent action, but only where it determines the whole merit of the case. *Robinson* v. *Howard*, 5 Cal. 428.

7. A count in a complaint for money had and received, which does not allege a demand, is demurrable. *Reina* v. *Cross*, 6 Cal. 29.

8. Where a bill alleges a parol trust, it seems that it must be denied; a general demurrer will not lie. *Peralta* v. *Castro*, 6 Cal. 354.

9. A demurrer admits the facts as alleged in the complaint. *Tuolumne Water Co.* v. *Chapman*, 8 Cal. 392.

10. A defendant may demur when the claim is barred by the statute of limitations on its face. *Sublett* v. *Tinney*, 9 Cal. 423; *Barringer* v. *Warden*, 12 Cal. 311; *Fellers* v. *Lee*, 2 Barb. 488; *Humbert* v. *Trinity Church*, 7 Paige, 194; *Van Hook* v. *Whitlock*, ib. 373.

11. When a demurrer is general to a complaint, courts are not bound to notice defects, which are mere matters of form. *Phelps* v. *Owens*, 11 Cal. 22.

12. Objections to the prayer of a complaint cannot be taken by demurrer. *Rollins* v. *Forbes*, 10 Cal. 299.

13. It is error to render a final judgment on demurrer to plaintiff's complaint. The plaintiff should have leave to amend, and then if he declines, final judgment should be given. *Gallagher* v. *Delaney*, 10 Cal. 410.

14. Unless a general demurrer be included under one or more of these causes, it cannot be sustained. *Hentsch* v. *Porter*, 10 Cal. 555.

15. A demurrer is not necessary in an equity case, when the plaintiff's case as made by his bill, shows that he has no title to the relief; this is an incurable infirmity which follows the case everywhere, and no decree can be affirmed which is shown by the bill to be erroneous in substance. *White* v. *Fratt*, Cal. April T. 1859.

16. If there is any defect in the complaint which a general demurrer would reach, a consent to the overruling of the demurrer disabled the defendants to avail themselves of it. *Mahony* v. *Wilson*, Cal. Jan. T. 1860.

17. If a demurrer is abandoned, it will be stricken from the case upon motion, as no longer forming a part of the record. *Brown* v. *Saratoga R. R. Co.*, 18 N. Y. 495.

18. Irrelevancy is no ground for a demurrer. *Smith* v. *Greenin*, 2 Sand. 702; *Watson* v. *Husson*, 1 Duer, 242.

19. A demurrer may be good as to one defendant and bad as to another. 1 Barb. Ch. Pr. 108.

20. Where two defendants appear and demur separately to the complaint, and both demurrers are allowed with leave to amend on payment of costs, each defendant is entitled to costs. *Collomb* v. *Caldwell*, 5 How. Pr. 336.

21. A demurrer is only appropriate when the ground of the demurrer is apparent on the face of the pleading. *Getty* v. *Hudson R. R. R. Co.*, 8 How. Pr. 177.

22. Duplicity is no ground for demurrer. *Welles* v. *Webster*, 9 How. Pr. 251; *Gooding* v. *M'Alister*, ib. 123; *Robinson* v. *Judd*, ib. 378.

23. A demurrer is proper when matter in abatement constituting a defense is apparent on the face of the complaint. *Mayhew* v. *Robinson*, 10 How. Pr. 162.

24. A demurrer will not be stricken out as frivolous, unless it is apparent without argument. *Sixpenny Savings Bank* v. *Sloan*, 12 How. Pr. 543; 2 Abbott, 414.

25. A party can only demur where the ground of demurrer appears on the face of the complaint. In so demurring the party must state the grounds on which he relies, and cannot obtain judgment for the cause stated in the demurrer. *Wilson* v. *Mayor of New York*, 15 How. Pr. 500.

26. A state court has no jurisdiction of a suit in which the existence and validity of a patent for an invention must necessarily be shown, to enable the plaintiff to make out his case. *Tomlinson* v. *Battel*, 4 Abbott, 266.

27. Judgment cannot be given for a demurrant on a ground different from that which is stated in the demurrer. *Wilson* v. *Mayor of New York*, 6 Abbott, 6.

28. A demurrer does not lie to an alternative writ of mandate. *People* v. *Harris*, 6 Abbott, 30.

29. 1st. The statute of April, 1854, gives to counties the right to prosecute and defend actions the same as individuals, and they have a legal capacity to sue. *Price* v. *Sacramento county*, 6 Cal. 254; *Gilman* v. *Contra Costa county*, ib. 676; 8 ib. 52; *Placer county* v. *Astin*, 8 Cal. 303. See note (*a*) p. 22.

30. 3d. A party wishing to avoid a sale on the ground of fraud, has no right to sue upon the contract at the same time. The latter suit may be pleaded in bar to the former. *Seligman* v. *Kalkman*, 8 Cal. 207.

31. If it appears no summons was issued in the other cause, or voluntary appearance made, there was then no suit pending, and the plea was overruled. *Weaver* v. *Conger*, 10 Cal. 233.

32. The parties may be plaintiff and defendant in one suit, and defendant and plaintiff in the other. *Groshons* v. *Lyon*, 16 Barb. 461; 1 Code R., N. S., 348.

33. Where it does not appear from the face of the complaint that another action is pending from the same cause, the objection should be stated as a defense in the answer, otherwise by demurrer. *Hornfager* v. *Hornfuger*, 6 How. Pr. 279.

34. Where a party is suing in two courts for the same cause of action, he may be compelled to elect in which court he will proceed. *Hammond* v. *Baker*, 1 Code R., N. S., 105.

35. 4th. Where a suit is brought upon a bill of lading made to the plaintiff jointly with another, the plaintiff has no separate cause of action. *Mayo* v. *Stansbury*, 3 Cal. 465.

36. After demurrer and the pleadings are amended by striking out a party demurred to, the defendant cannot object to the non-joinder of that party. *Powell* v. *Ross*, 4 Cal. 197.

37. The objection to the misjoinder of parties and of the cause of action, should have been taken by demurrer or answer. *Jacks* v. *Cooke*, 6 Cal. 164.

38. If the wife is improperly joined it should have been taken advantage of by demurrer. *Tissot* v. *Throckmorton*, 6 Cal. 471.

39. Where the complaint charged that A was indebted to plaintiff, and had conveyed his property to B, to be disposed of for his benefit, and had drawn an order in favor of plaintiff, on B, who had accepted it, and further charged that B had subsequently reconveyed a portion of the property to A, without consideration, praying that B be compelled

to execute the trust in favor of plaintiff: held, that A was a proper and necessary party to the action. *Lucas* v. *Payne*, 7 Cal. 92.

40. Where a defect of parties appears upon the face of the complaint, the defect must be taken advantage of by demurrer. *Andrews* v. *Mokelumne Hill Co.*, 7 Cal. 330; *Dunn* v. *Tozer*, 10 ib. 167.

41. Where the husband and wife are nominally joined as plaintiffs, but the cause of action in the complaint was a contract only with the husband, the name of the wife is mere surplusage, and not a defect of parties. It should be stricken out on motion. *Warner* v. "*Uncle Sam*," 9 Cal. 697.

42. The objection to the misjoinder of parties must be taken in the court below and not in the appellate court for the first time. *Sands* v. *Pfeiffer*, 10 Cal. 258.

43. Where the defendant demurred to the complaint for a misjoinder of parties plaintiff, and was overruled, and plaintiffs then moved to amend by striking out these parties, and defendants resisted such motion: held, that such action was a waiver of the objection raised by the demurrer. *Summers* v. *Farrish*, 10 Cal. 347.

44. The personal representative of a deceased partner cannot be joined as a party defendant with the surviving partner, to an action for a partnership debt, where the complaint does not show the plaintiff's inability to procure satisfaction from the survivor. *Voorhis* v. *Childs*, 17 N. Y. 354.

45. The joinder of too many persons as defendants, where there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the claimant states a good cause of action. *The New York and New Haven R. R. Co.* v. *Schuyler*, 17 N. Y. 592.

46. A demurrer for non-joinder of parties is well taken, where it appears that the court cannot determine the controversy before it without prejudice to the rights of parties, nor by saving their rights. *Wallace* v. *Eaton*, 5 How. Pr. 99.

47. A motion to strike out a co-defendant, where the defendants are improperly joined in the action, is the proper remedy where the misjoinder is not apparent upon the face of the complaint. If apparent, a demurrer would be the remedy. *Bailey* v. *Easterly*, 7 ib. 495.

48. 5th. If law and equity are inseparably mixed together in a complaint, it is undoubtedly demurrable. *Gates* v. *Keiff*, 7 Cal. 124; *Bigelow* v. *Gove*, ib. 133.

49. The objection that several causes of action have been improperly joined, is waived by a failure of defendant to demur. *Marius* v. *Bicknell*, 10 Cal. 217.

50. There is no misjoinder of actions in an action against husband and wife to foreclose a mortgage executed by husband and wife to secure a note given by the husband alone, where the prayer of the complaint was for judgment against the husband and a decree against the husband and wife for a sale of the premises. *Rollins* v. *Forbes*, 10 Cal. 299.

51. A demurrer which alleges "that several causes of action are improperly joined in the complaint," is a general demurrer and unauthorized. *Hinds* v. *Tweddle*, 7 How. Pr. 278.

52. A cause of action arising on contract, cannot be united with one arising in tort. *Waller* v. *Raskan*, 12 ib. 28.

53. Seeking to charge the defendant individually and as an executor, is not allowable. *McMahon* v. *Harrison*, 12 How. Pr. 39.

54. When the complaint in fact contains but a single cause of action, although stated in different counts, whatever else it may contain, the defendant cannot successfully demur on the ground that several causes of action are improperly united. *Hillman* v. *Hillman*, 14 ib. 456.

55. A demurrer does not lie to a complaint for the defect of not separately stating two or more causes of action, they being such as might be united in one complaint, if properly drawn. *Dorman* v. *Kellam*, 14. How. Pr. 184; 4 Abbott, 202; *Badger* v. *Benedict*, ib. 176.

56. 6th. Where a complaint, though defective, states facts sufficient to constitute a cause of action, the objections to it should be taken by demurrer. *Greenfield* v. *Steamer "Gunnell,"* 6 Cal. 67.

57. It now seems to be settled, that a demurrer authorized by this subdivision need only state the language thereof. *Ellisen* v. *Halleck*, 6 Cal. 386; *Haire* v. *Baker*, 1 Selden, 357; *Johnson* v. *Wetmore*, 12 Barb. 433; *Noxon* v. *Bentley*, 7 How. Pr. 316; *Hyde* v. *Conrad*, 3 Code R. 162; 5 How. Pr. 112; *Hoogland* v. *Hudson*, 8 How. Pr. 343; *Graham* v. *Camman*, 13 ib. 360; 5 Duer, 697.

58. A complaint in divorce on the charge of adultery, must state the facts with reasonable certainty as to time and place, or it is demurrable. *Conant* v. *Conant*, 10 Cal. 249.

59. This provision is confined to those cases in which no cause of action at all as against the defendants arises from the complaint. *Summers* v. *Farrish*, 10 Cal. 347.

60. But should a defendant state what facts are needed, then he cannot insist on others at the argument of the demurrer. *Nellis* v. *De Forest*, 16 Barb. 65; *Kneiss* v. *Seligman*, 5 How. Pr. 425.

61. A demurrer in this form applies only to such defects as would render the count bad on general demurrer at law, or bad for want of equity in chancery. *Graham* v. *Camman*, 5 Duer, 697; 13 How. Pr. 360.

62. A demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action, does not reach an objection that the complaint does not show that plaintiff is an incorporated body, capable of bringing suit; that objection must be taken under subdivision second. *Bank of Lowville* v. *Edwards*, 11 How. Pr. 216.

63. A demurrer in this form puts in issue the validity of the whole complaint, so that if the complaint is deficient by the non-statement of any fact necessary for the plaintiff to prove to make out his action, the demurrer must be sustained. *White* v. *Brown*, 14 How. Pr. 282.

64. A complaint by an assignee, which, after setting out the chose in action upon which suit is brought, and stating that on such a day, etc., it was assigned by the payee to plaintiff, alleges that it is the *property* of the assignor, is bad on demurrer that it does not state facts sufficient to constitute a cause of action, although the assignment stated was in trust, and the plaintiff alleges that he has possession of the note. *Palmer* v. *Smedley*, 6 Abbott, 205.

65. If a complaint containing several causes of action is demurred to on the ground

that the several counts do not state facts sufficient to constitute a cause of action, the demurrer must be overruled unless all the statements are insufficient. *Martin* v. *Mattison*, 8 Abbott, 3.

66. A complaint is not bad on demurrer as not stating facts sufficient to constitute a cause of action, however inartificially they may be stated. On such demurrer it is the duty of the court to analyze the facts disclosed, and if the whole, or any part of them, can be resolved into a cause of action, the demurrer should be overruled. *People* v. *Mayor of New York*, 8 Abbott, 7.

41. The demurrer shall distinctly specify the grounds upon which any of the objections to the complaint are taken. Unless it do so, it may be disregarded.

42. The defendant may demur to the whole complaint, or to one or more of several causes of action stated therein, and answer the residue; or may demur and answer at the same time.

1. The defendant cannot demur to part and answer another part of a complaint which contains but one cause of action stated in one count. In other words, a defendant cannot demur to part of a cause of action. *Ingraham* v. *Baldwin*, 12 Barb. 9.

2. After an extension of time to answer, the defendant may put in a demurrer instead of answering. *Brodhead* v. *Brodhead*, 3 Code R. 8.

43. [1854, 1855.*] If the complaint be amended, a copy of the amendments shall be filed, or the court may, in its discretion, require the complaint as amended to be filed, and a copy of the amendments shall be served upon every defendant to be affected thereby, or upon his attorney, if he has appeared by attorney; the defendant shall answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer, as in other cases.

1. The plaintiff has no right to amend his complaint by striking out the name of one or more parties, without leave of the court. *Russell.* v *Spear*, 5 How. Pr. 142.

44. When any of the matters enumerated in section forty do not appear upon the face of the complaint, the objection may be taken by answer.

1. The objection to the misjoinder of parties, and of the cause of action, should have been taken by demurrer or answer. *Jacks* v. *Cooke*, 6 Cal. 164; *Alvarez* v. *Brannan*, 7 ib. 503; *Andrews* v. *Mokelumne Hill Co.*, ib. 330; *Whitney* v. *Stark*, 8 ib. 514; *Leavitt* v. *Fisher*, 4 Duer, 2; *Lewis* v. *Graham*, 4 Abbott, 106.

* Statutes of 1855, 196.

45. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action.

1. The failing to demur does not waive the right of defendant to object on the trial for the first time, that the complaint does not state facts sufficient to constitute a cause of action. *Montgomery County Bank* v. *Albany City Bank*, 3 Seld. 459; *Higgins* v. *Freeman*, 2 Duer, 650.

2. An incurable defect is not waived by any pleading, but may be taken advantage of whenever the parties are before the court, either by motion, or on the trial, by motion in arrest after verdict. *St. John* v. *Northrup*, 23 Barb. 30; *Burnham* v. *DeBevorse*, 8 How. Pr. 159.

46. [1854, 1860.*] The answer of the defendant shall contain:

1st. If the complaint be verified, a specific denial to each allegation of the complaint controverted by the defendant, or a denial thereof, according to his information and belief; if the complaint be not verified, then a general denial to each of such allegations, but a general denial shall only put in issue the material and express allegations of the complaint.

2d. A statement of any new matter *or counter claim* constituting a defense, in ordinary and concise language. *When the answer contains new matter constituting a defense, the plaintiff may, within the same length of time allowed for answering, and subject to the same rules, reply to such new matter; and if he fail to do so, such new matter shall be taken as true, and deemed proved at the trial. If new matter of set-off and counter claim be set up in the answer, the reply may contain matter of set-off and counter claim, not embraced in the complaint. All new matter set up in the replication, shall be deemed denied by the defendant.*

1. To set up tender in answer as a defense to costs, see section 506.

2. Affirmative matter alleged by defendant in his answer, must be proven. *Osborn* v. *Hendrickson*, 8 Cal. 31.

3. After a motion to dismiss for the irregularity of the summons has been overruled, the defendant may answer without waiving any rights by this appearance. *Deidesheimer* v. *Brown*, 8 Cal. 339.

4. The promissory note sued on was attached to the complaint: the answer did not

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* Statutes of 1860, 000.

deny the execution of the note, but denied the indebtedness: held, to be no denial at all. *Kinney* v. *Osborne*, Cal. Oct. T. 1859.

5. A verified answer should be consistent in itself, and should not deny in one sentence what it admits to be true in the next. The object of verification is to elicit the truth, and this object must be entirely defeated if the same fact may be denied and admitted in the same pleading. *Hensley* v. *Tartar*, Cal. Jan. T. 1860.

6. An answer which merely alleges, without denying any fact stated in the complaint, that the defendant denies that the plaintiff is entitled to the money demanded, will be stricken out on motion. *Drake* v. *Cockcroft*, 4 E. D. Smith, 34.

7. An answer is bad when it controverts no allegation of the complaint, and sets up no new matter in bar, but merely denies a conclusion of law. *McMurray* v. *Gifford*, 5 How. Pr. 14.

8. The answer and demurrer are different pleadings, and by the fact that they are on one paper, and in form connected, they do not lose their distinct character. *Howard* v. *Michigan Southern R. R. Co.*, 5 How. Pr. 206.

9. A supplemental answer may be allowed, on motion, whenever the facts forming the ground of this answer occurred since the answer was put in. *Drought* v. *Curtis*, 8 ib. 56.

10. An answer must either deny allegations in the complaint, or set up new matter by way of defense. *Gould* v. *Williams*, 9 ib. 51.

11. If the new matter occurs after answer, the defense must be made by a supplemental answer. *Hornfager* v. *Hornfager*, 1 Code R., N. S., 180.

12. 1st. When a complaint alleges that the plaintiff was in quiet and peaceable possession of the premises, and was dispossessed by defendants, by force, or under an illegal order made by an officer having no jurisdiction, the answer should take issue directly upon the allegations of the complaint, or confessing them, should state distinctly and positively, new matter sufficient to avoid them. *Ladd* v. *Stevenson*, 1 Cal. 18.

13. When a chancery suit is heard on bill and answer, all the allegations in the answer, whether upon knowledge or information and belief, are to be taken as true. If the complainant wishes to dispute any of the allegations in the answer, he must file a replication, and thus enable the defendant to establish them by proof, if he can. *Von Schmidt* v. *Huntington*, 1 Cal. 55.

14. It is no defense to a suit on a negotiable bill of exchange, that the suit is brought in the name of a mere agent or stranger, or a fictitious person. *Lineker* v. *Ayeshford*, 1 Cal. 76.

15. The complaint alleged the making of a note and the indorsement thereof, and the answer was a general denial in the terms of the old general issue in assumpsit, that the defendant undertook and promised, in manner, form, etc.: held, that the plaintiff would have been entitled to judgment, on a motion in the court below to strike out the answer as a nullity; but held, further, that he should have raised his objection to the answer in the court below, and had it passed upon, and that having rested his cause at the trial on the ground of the want of an affidavit, he will not be permitted to say on appeal, for the first time, that the answer does not, in a proper form, controvert the allegations of the complaint. *Grogan* v. *Ruckle*, 1 Cal. 194.

16. Where defendant's answer is a general denial, it has the same influence as a plea

at common law of the general issue, and accord and satisfaction may be given in evidence. *Gavin* v. *Annan*, 2 Cal. 494; *McLarren* v. *Spalding*, 2 Cal. 510.

17. The effect of this general denial is, that any matter can be given in evidence which shows that plaintiff never had any cause of action, and most matters in discharge of the action. *McLarren* v. *Spalding*, 2 Cal. 510.

18. Matters in avoidance must be specially pleaded. *Gaskill* v. *Trainer*, 3 Cal. 334.

19. A specific denial of one or more allegations, is an admission of all others well pleaded. *DeRo* v. *Cordes*, 4 Cal. 117.

20. The admission, by an attorney of record, of the correctness of the amount due for which judgment is taken, when not done in fraud of the rights of his client, must destroy the effect of the denial in answer. *Taylor* v. *Randall*, 5 Cal. 79.

21. The answer to a complaint on a promissory note, where the defense relied upon is that the note was obtained by fraud, should set out the circumstances under which the note was given, and point out the facts which constitute the fraud. *Gushee* v. *Leavitt*, 5 Cal. 160.

22. Where an answer contains an allegation of the alteration of an instrument, it should aver, first, that the alteration was made with the knowledge or consent of, or by the plaintiff's authority; and second, must show that the alteration was material. *Humphreys* v. *Crane*, 5 Cal. 173.

23. Where the answer in a suit against a corporation on its note, relies merely on the want of power of the corporation to issue notes, the defendant cannot afterwards object that the plaintiff has not shown that the officers executing the note were empowered by the corporation to do so. *Smith* v. *Eureka Mills Co.*, 6 Cal. 1.

24. Where a bill alleges a parol trust, it seems that it must be denied, and a general demurrer will not lie. *Peralta* v. *Castro*, 6 Cal. 354.

25. Where the complaint asserts the fact that the estate is still indebted to persons mentioned in a certain sum, which is not denied, and that the deceased at the time he conveyed the property described in the conveyance, was insolvent without the property, and the answer recited that if deceased was insolvent at the date of the deed, they were ignorant of the fact: held, that the answer was not sufficient; there should have been a specific denial of each allegation controverted by the defendants, or a denial thereof according to their information or belief. *Swartz* v. *Hazlett*, 8 Cal. 118.

26. The answer must contain a specific denial to each allegation, if the complaint is sworn to, or every material allegation not specially controverted by the answer will be taken as true. *Dewey* v. *Bowman*, 8 Cal. 145; *Curtis* v. *Richards*, 9 Cal. 33; *Humphreys* v. *McCall*, 9 Cal. 59; *Burke* v. *Table Mountain Water Co.*, 12 Cal. 403.

27. The failure of a defendant to deny the charges in a complaint, making out a *prima facie* case for the plaintiff, will throw the *onus* on defendant of proving his affirmative allegations. *Thompson* v. *Lee*, 8 Cal. 275.

28. An answer is fatally defective, if it does not deny any of the material allegations of a verified complaint, either positively or according to information and belief, the only form in which the allegations of a verified complaint can be controverted so as to raise an issue. A denial in any other form is unknown to our system of practice. *San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 453.

29. The answer that the defendant, a municipal corporation, "has no knowledge or

information" in respect to the allegations of a count in a verified complaint, "and therefore denies the same," is insufficient. *San Francisco Gas Co.* v. *City of San Francisco*, 9 Cal. 453.

30. The true and just rule is, that the defendant must either deny the facts as alleged, or confess and avoid them. *Piercy* v. *Sabin*, 10 Cal. 22.

31. Under the system of practice in this state, a general denial is equivalent to the general issue at common law, and such a plea does not put in issue the plaintiff's title to sue. *White* v. *Moses*, 11 Cal. 69.

32. The effect of a denial of the allegations of a complaint is to cast the burthen of proof upon the plaintiff; but when the proof is given, no evidence of a defense not set up in the answer can be received. *Glazer* v. *Clift*, 10 Cal. 303; *Texier* v. *Gouin*, 5 Duer, 389.

33. Where there are several answers, an admission made in one is not available against the others. Each answer must stand by itself, as a complete defense, and the plaintiff must recover upon the whole record. *Swift* v. *Kingsley*, 24 Barb. 541.

34. An answer which denies a material allegation of the complaint, cannot be stricken out as frivolous. *Davis* v. *Potter*, 4 How. Pr. 155.

35. Where the cause of action is divisible, or several causes are stated, the defendant may deny part and leave the residue unanswered. *Snyder v. White*, 6 How. Pr. 321; *Smith* v. *Shufelt*, 3 Code R. 175; *Tracy* v. *Humphrey*, ib. 190.

36. Where plaintiff sues in a representative capacity, an answer denying knowledge or information sufficient to form a belief whether defendant is indebted to plaintiff is not frivolous. *Morrow* v. *Cougan*, 3 Abbott, 328.

37. An answer served in time and verified if necessary, cannot be treated as a nullity simply because the defense which it sets up is defective. *Bergman* v. *Howell*, 3 Abbott, 329.

38. 2d. A defendant should set forth the true nature of his defense in his answer, and in case he does not, should not be permitted to insist upon it. *Walton* v. *Minturn*, 1 Cal. 362.

39. The special defense of "unworkmanlike manner" must be set up in the answer. The contract, and not whether the article is fit for use, must rule. *Kendall* v. *Vallejo*, 1 Cal. 371.

40. A vendee may avail himself of fraud, breach of warranty, or failure of consideration, by way of defense, in an action upon contract. *Flint* v. *Lyon*, 4 Cal. 17.

41. The defense that defendant acted upon advice of counsel, must show that such advice was given upon a full and fair statement of the facts. *Bliss* v. *Wyman*, 7 Cal. 257.

42. Where the defendant has fully and fairly laid his case before counsel, and acts by advice thereof, it is a good defense to the action, though the question whether the defendant acted *bona fide* under such advice, is a question of intention to be determined by the jury. *Potter* v. *Seale*, 8 Cal. 217.

43. The want of capacity to sue should be specifically set up in the answer. The general issue is not sufficient. *California Steam Navigation Co.* v. *Wright*, 8 Cal. 585.

44. To plead a former judgment in bar, it must appear not only that it was upon the same cause of action, but between the same parties. *Chase* v. *Swain*, 9 Cal. 130.

45. All new matter must be stated in the answer. It is that which the defendant

must establish affirmatively. *Piercy* v. *Sabin*, 10 Cal. 22; *Glazer* v. *Clift*, 10 Cal. 303; *McKyring* v. *Bull*, 16 New York, 297.

46. To support a plea in abatement, founded on the pendency of a prior action, it is necessary to show that process was issued in such action. *Weaver* v. *Conger*, 10 Cal. 233; *Primm* v. *Gray*, ib. 522.

47. Facts relied on as constituting a defense, must be set forth at least with so much certainty as to enable the court to say that if true, the action would be barred; therefore, if an award be pleaded, its substance, if not in terms, must be set forth, in order that the court may judge of its validity as a bar. *Gihon* v. *Levy*, 2 Duer, 176.

48. Where matter of defense occurs after the commencement of the action, and before answer, it may be set up by answer. *Beals* v. *Cameron*, 3 How. Pr. 414.

49. The new matter must be facts, and if fraud is alleged, the facts and circumstances of the fraud must be set forth. *McMurray* v. *Gifford*, 5 How. Pr. 14.

50. Matter in abatement constituting a defense, should be pleaded or set up in the answer, unless it is apparent on the face of the complaint. *Mayhew* v. *Robinson*, 10 How Pr. 164; contra, *Van Buskirk* v. *Roberts*, 14 ib. 61.

51. An answer of new matter which does not state facts sufficient to constitute a defense, is always insufficient, and may be demurred to. *Welch* v. *Hazelton*, 14 How. Pr. 97.

52. The non-joinder of parties can be taken advantage of by answer, where it does not appear upon the face of the complaint. *Crooke* v. *O'Higgins*, 14 How. Pr. 154.

47. [1860.*] The counter claim mentioned in the last section shall be one existing in favor of the defendant or plaintiff, and against a plaintiff or defendant, between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1st. A cause of action arising out of the transaction set forth in the complaint *or answer*, as the foundation of the plaintiff's claim, *or defendant's defense*, or connected with the subject of the action.

2d. In an action arising upon contract, any other cause of action arising also upon contract, and existing at the commencement of the action.

See sections 5, 176, 199.

1. A set-off must be pleaded in the answer. *Bernard* v. *Mullot*, 1 Cal. 368; *Hicks* v. *Green*, 9 Cal. 74; *Bogardus* v. *Parker*, 7 How. Pr. 301.

2. Where the plaintiff filed his bill to foreclose a mortgage executed by defendants, who admit the demand, but ask that a certain sum be retained in court to answer a judgment against defendants, to the satisfaction of which they claim that the plaintiff is proportionately liable as a former partner of defendants, although he was not served with process in the case: held, that it was error to retain such sum in court. The

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* Statutes of 1860, 000.

defendants must satisfy such judgment, and then establish their claim against the plaintiff by action. *Bell* v. *Walsh*, 7 Cal. 84.

3. To authorize a set-off at law, the debts must be between the parties in their own rights, and must be of the same kind or quality, and be clearly ascertained or liquidated; they must be certain and determined debts. *Naglee* v. *Palmer*, 7 Cal. 543.

4. In general, the mere existence of cross demands will not justify a set-off in a court of chancery. There must be some peculiar circumstances based upon equitable grounds, to warrant the court in interfering. Ib.

5. Where a negotiable promissory note not yet due, is taken *bona fide* as collateral security for a pre-existing debt, it is not subject to any defense existing at the date of the assignment between the parties. *Payne* v. *Bensley*, 8 Cal. 260.

6. A debtor has a right to purchase cross demands against the partnership, and to set them up as a defense to the debt due by him to the partnership. *Naglee* v. *Minturn*, 8 Cal. 540.

7. A court of equity, upon bill filed, will compel an equitable set-off, when the parties have mutual demands against each other which are so situated that it is impossible for the party claiming a set-off to obtain satisfaction of his claim by an ordinary suit at law or in equity. *Russell* v. *Conway*, 11 Cal. 93.

8. A set-off cannot be pleaded by one of several defendants sued on joint liability. *Collins* v. *Butler*, Cal. Oct. T. 1859; *Peabody* v. *Bloomer*, 6 Duer, 53; 3 Abbott, 353.

9. Counter claims embrace both set-off and recoupments under the old system. *Pattison* v. *Richards*, 22 Barb. 143.

10. After a set-off is pleaded and admitted, the plaintiff cannot discontinue as a matter of course. *Cockle* v. *Underwood*, 3 Duer, 676; 1 Abbott, 1; contra, *Rees* v. *Van Patten*, 13 How. Pr. 258.

11. An answer containing a counter claim is not demurrable on the ground that it is not an answer to the whole of plaintiff's cause of action. *Allen* v. *Haskins*, 5 Duer, 332.

12. A defendant cannot set up as a counter claim a note made by the plaintiff, unless it was due and belonged to the defendant when the action was commenced. *Van Valen* v. *Lapham*, 5 Duer, 689; 13 How. Pr. 240.

13. A claim founded on contract cannot be offset to damages proved in an action for conversion to personal property. *Donohue* v. *Henry*, 4 E. D. Smith, 162.

14. In an action for unliquidated damages, the defendant may set up as a counter claim damages arising on contract, though not out of the same cause of action. *Lignot* v. *Redding*, ib. 285.

15. A statement of set-off is a defense. *Ranney* v. *Smith*, 6 How. Pr. 420; *Willis* v. *Taggard*, ib. 433.

16. A counter claim defined and discussed. *Silliman* v. *Eddy*, 8 ib. 122.

17. A counter claim is a cross demand. *Davidson* v. *Remington*, 12 ib. 310.

18. A counter claim may arise out of claims either legal or equitable. *Lemon* v. *Trull*, 13 ib. 248.

19. If the counter claim is not admitted, the plaintiff may discontinue. *Seabord & Roanoke R. R. Co.* v. *Ward*, 1 Abbott, 46; *Oaksmith* v. *Sutherland*, 4 ib. 15.

20. Where, in an action on contract the plaintiff recovers less than fifty dollars, but extinguishes a counter claim set up in the answer which exceeds that amount, neither party is entitled to costs. *Kalt* v. *Lignot*, 3 Abbott, 33, 190.

21. In an action by the assignee of a claim, a demand existing prior to the assignment in favor of the defendant, and against the assignor, is unavailable as a counter claim; it must be pleaded as a defense. *Ferreira* v. *Depau*, 4 ib. 131; *Dillaye* v. *Niles*, ib. 253.

22. In considering a counter claim upon demurrer to it for alleged insufficiency, the facts alleged in the complaint which are not inconsistent with the averments in the counter claim, are to be taken as admitted. *Graham* v. *Dunnigan*, ib. 426.

48. When cross demands have existed between persons, under such circumstances, that if one had brought an action against the other, a counter claim could have been set up, neither shall be deprived of the benefit thereof, by the assignment or death of the other; but the two demands shall be deemed compensated, so far as they equal each other.

49. The defendant may set forth by answer as many defenses and counter claims as he may have. They shall each be separately stated, and the several defenses shall refer to the causes of action which they are intended to answer, in a manner by which they may be intelligibly distinguished.

1. The separate grounds of defense, separately stated, take the place of separate pleas. *Cobb* v. *Frazee*, 4 How. Pr. 413.

2. The court must take notice of equitable as well as legal set-offs and defenses. *Miller* v. *Loses*, 9 ib. 356.

3. Plea in abatement may be joined with a plea in bar. *Sweet* v. *Tuttle*, 10 ib. 40.

4. A defendant may avail himself of as many defenses as he may have, but each must be separately stated, and be consistent in itself. *Porter* v. *McCreedy*, 1 Code R., N. S., 88.

5. Each defense separately stated as a separate defense, must be in itself complete, and must contain all that is necessary to answer the whole cause of action, or to answer that part thereof which it purports to answer. *Xenia Branch Bank* v. *Lee*, 7 Abbott, 372.

50. [1854, 1860.*] When the answer contains new matter, the plaintiff may, *within the number of days in which the defendant is by the summons required to answer, said days to be computed from the time of the service on the plaintiff of such answer, demur to the same for*

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insufficiency, stating in his demurrer the grounds thereof, and he may also, within the same time, demur to one or more defenses, set up in the answer, and the defendant may in like manner demur to the plaintiff's replication. Sham and irrelevant answers, replications and defenses, and so much of any answer or replication as may be irrelevant, redundant or immaterial, may be stricken out on motion, and upon such terms as the court in its discretion may impose.

1. Where neither complaint nor answer is verified, and the answer merely denies the allegations in the complaint, setting up no new matter, it cannot be stricken out as sham. *Brooks* v. *Chilton*, 6 Cal. 640; *Goedel* v. *Robinson*, 1 Abbott, 116.

2. A sham answer upon its face is good, but it sets up new matter which is false. A frivolous answer controverts no material allegation in the complaint, and presents no tenable defense. *Piercy* v. *Sabin*, 10 Cal. 22; *People* v. *Macumber*, 18 N. Y. 315; *Thorn* v. *N. Y. Central Mills*, 10 How. Pr. 19; *Lefferts* v. *Snedikar*, 1 Abbott, 41; *Gilbert* v. *Covell*, 16 How. Pr. 34.

3. An answer denying no material allegation in the complaint, may be stricken out as sham, although duly verified. *People* v. *Macumber*, 18 N. Y. 315.

4. A plaintiff has no right to adjudge an answer frivolous, and treat it as a nullity, so long as it is regularly put in and duly verified. *Swift* v. *De Witt*, 3 How. Pr. 280; *Hartness* v. *Bennett*, ib. 289.

5. Irrelevant and redundant matter must be such as cannot be reached by demurrer, and also prejudicial to the adverse party, to authorize it to be stricken out. *White* v. *Kidd*, 4 How. Pr. 58; *Hynds* v. *Griswold*, ib. 69.

6. Irrelevant and redundant matter stricken out of an answer because the matter could not in any way be made the subject, or form a part of a material issue in the action. *Williams* v. *Hays*, 5 How. Pr. 470; *Lewis* v. *Kendall*, 6 ib. 69; *Rensselaer Plank Road Co.* v. *Wetsel*, ib. 68; *Stewart* v. *Bouton*, ib. 71.

7. No part of an answer ought to be stricken out which can in any event become material. *Averill* v. *Taylor*, 5 ib. 476.

8. An entire complaint cannot be stricken out as irrelevant or redundant on motion. *Benedict* v. *Dake*, 6 ib. 352.

9. A sham answer and defense is one that is false in fact and not pleaded in good faith. It may be perfectly good in form, and to all appearance a good defense. A frivolous answer is one that shows no defense, conceding all it alleges to be true. *Nichols* v. *Jones*, 6 How. Pr. 355; *Ostrom* v. *Bixby*, 9 ib. 57; *Fleury* v. *Roger*; ib. 215; *Winne* v. *Sickles*, ib. 217; *Brown* v. *Jenison*, 1 Code R., N. S., 156.

10. Irrelevant and redundant matter may be contained in a pleading which contains a good cause of action or defense. *Harlow* v. *Hamilton*, 6 How. Pr. 475.

11. Where a pleading is regularly served and within the proper time, though defective, so that the only question is upon its sufficiency, it cannot be disregarded as a nullity. *Strout* v. *Curran*, 7 ib. 36.

12. A demurrer will not lie to a mere denial in an answer. It must contain new matter by way of defense. *Thomas* v. *Plumb*, ib. 57; *Loomis* v. *Dorsheimer*, 8 ib. 9;

Simpson v. *Loft*, ib. 234; *Rocca* v. *Saugertis Co.*, ib. 237; *Reilay* v. *Thomas*, 11 ib. 266; contra, *Kneedler* v. *Sternberg*, 10 ib. 67.

13. The motion to strike out the entire answer as frivolous, is irregular. *Hull* v. *Smith*, 8 ib. 149.

14. A demurrer to an answer not containing new matter constituting a counter claim, is a nullity, on which no judgment can be legally given for either party. *Richtmyer* v. *Haskins*, 9 How. Pr. 481; *Myatt* v. *Saratoga Mutual Ins. Co.*, ib. 488.

15. A decision for judgment on account of the frivolousness of the answer, is an order and not a judgment, but it is appealable. *Western R. R. Co.* v. *Kortright*, 10 ib. 457.

16. A demurrer will not be stricken out as frivolous, unless it is apparent without argument. *Sixpenny Savings Bank* v. *Sloan*, 12 ib. 543; 2 Abbott, 414.

17. A verified answer will not be stricken out as sham, if there is any evidence that it was interposed in good faith. *Gregg* v. *Reader*, 15 How. Pr. 371; *Mumm* v. *Barnum*, 1 Abbott, 281.

18. A denial in an answer, of knowledge or information sufficient to form a belief as to matters stated in a complaint, is not necessarily sham or evasive, unless it appears that the party had the means of obtaining information directly within his reach. *Weson* v. *Judd*, ib. 254.

19. Where an order is made pronouncing an answer frivolous, and proceeding to declare the appropriate judgment upon the case, appeal should be taken from the judgment and not from the order. *Martin* v. *Kanouse*, 2 ib. 390.

20. Under the authority in all cases to demur to the sufficiency of the answer, the defendant may in all cases amend his answer as of course. *Townsend* v. *Platt*, 3 ib. 323.

21. The fact that a demurrer is manifestly not well taken upon authority, does not of itself of course render the demurrer frivolous. *The Bank of Wilmington* v. *Barnes*, 4 ib. 226.

22. Where an answer contained *two* defenses, and plaintiff moved for judgment for frivolousness of answer, and one defense was held good and the other frivolous: held, that the latter defense might be stricken out. *Hecker* v. *Mitchell*, 5 ib. 454.

23. An answer to a complaint on a promissory note, setting up matter which if proven will call upon the plaintiff to show himself to be a *bona fide* indorsee for value before maturity, is not to be stricken out as sham because the defendant's affidavits do not fully deny the allegations of the plaintiff's affidavits setting out his title. *Wirgman* v. *Hicks*, 6 ib. 17.

51. [1860.*] Every pleading shall be subscribed by the party or his attorney, and when the complaint is verified (*a*) by affidavit, the answer *and replication* shall be verified also, except as provided in the next section.

See section 319.

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(*a*) In every action for a divorce, the complaint must be verified. *Statutes of* 1857, 240; *Wood's Digest*, 491, Art. 2640.

1. The word "attorney," refers to the attorney at law and not in fact. A pleading subscribed by an attorney in fact, without authority so to do, is void. *Dixey* v. *Pollock*, 8 Cal. 570.

2. Where an attachment was issued on a complaint, which was a printed form with the blanks filled up by the clerk, at the request of plaintiff, but no name signed to it until the next day, and after other attachments on the same property, when it was signed by the clerk, with the name of plaintiff's attorney: held, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. Ib.

3. An answer unverified to a verified complaint, may be stricken out on motion, and an application for a judgment as upon default may be made at the same time. *Drum* v. *Whiting*, 9 Cal. 422.

52. [1860.*] The verification of the answer *or replication* required in the last section may be omitted, when an admission of the truth of the complaint *or answer* might subject the party to prosecution for felony *or misdemeanor*.

1. This provision sustained. *Drum* v. *Whiting*, 9 Cal. 422; *Blaisdell* v. *Raymond*, 5 Abbott, 144.

53. When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless the answer denying the same be verified.

1. In an action on a promissory note by a special indorsee against the maker, the plaintiff must prove at the trial the genuineness of the indorsements, although the defendant has not denied their genuineness under oath. *Grogan* v. *Ruckle*, 1 Cal, 158.

2. A party is not required to deny an indorsement under oath. *Youngs* v. *Bell*, 4 Cal. 201.

54. [1860.*] When the defense to an action is founded upon a written instrument and a copy thereof is contained in the answer, or a copy is annexed thereto, the genuineness and due execution of such instrument shall be deemed admitted, unless *the replication denying the same be verified.*

55. In all cases of the verification of a pleading, the affidavit of the party shall state that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters, that he believes it to be true. And where

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a pleading is verified, it shall be by the affidavit of the party, unless he be absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same. When the pleading is verified by the attorney, or any other person except the party, he shall set forth in the affidavit the reasons why it is not made by the party. When a corporation is a party, the verification may be made by any officer thereof; or when the state, or any officer thereof in its behalf, is a party, the verification may be made by any person acquainted with the facts, except that in actions prosecuted by the attorney general in behalf of the state, the pleading need not, in any case, be verified.

1. Where the complaint is verified, it is no error to allow the defendant to verify his answer before trial, unless it is shown that the plaintiff is thereby taken by surprise. *Angier* v. *Masterson*, 6 Cal. 61.

2. The objection to the want of verification to the declaration should have been made either before answer or with the answer. It comes too late after answer. *Greenfield* v. *Steamer "Gunnell,"* 6 Cal. 67.

3. When from the nature of the facts alleged, it must be presumptively within the knowledge of the defendant, the answer should be positive one way or the other, and a denial according to recollection is evasive. And when the contrary is not presumptively within his knowledge, then a denial of all knowledge or information is insufficient. *Curtis* v. *Richards*, 9 Cal. 33; *Humphries* v. *McCall*, ib. 59.

4. The word "belief" is to be taken in its ordinary sense, and means the actual conclusion of the party drawn from information. Positive knowledge and mere belief cannot exist together. *Humphries* v. *McCall*, ib. 59.

5. The verification of an answer may be omitted whenever the defendant would be excused from testifying as a witness to the truth of any matter denied by such answer. *Drum* v. *Whiting*, ib. 422; *Blaisdell* v. *Raymond*, 5 Abbott, 144.

6. To a complaint verified, the defendant by mistake filed a copy of the original verified answer; parties took depositions and went to trial; when plaintiff closed his case, he then asked for a judgment by default, on perceiving the omission, which the court allowed: held, it was error, and the court should have permitted the defendant to verify his answer. *Arrington* v. *Tupper*, 10 Cal. 464.

7. A verification before a county recorder under our statute is sufficient. *Pfeiffer* v. *Rhein*, Cal. July T. 1859.

8. If the affidavit merely states that the pleading is true, without stating that it is true to the *knowledge* of the affiant, it is defective. *Williams* v. *Reil*, 5 Duer, 601.

9. An affidavit verifying a pleading is defective in using the words "information *and* belief" instead of "information *or* belief." It may however be amended. *Davis* v. *Potter*, 4 How. Pr. 155.

10. When the verification is by the attorney, he must set forth his knowledge or the

ground of his belief on the subject, and the reason why it was not made by the party. *Fitch* v. *Bigelow*, 5 ib. 237; *Stannard* v. *Mattice*, 7 ib. 4; *People* v. *Allen*, 14 ib. 334.

11. An attorney may verify in two cases; when the action is founded on a written instrument in his possession, and when all the material allegations of the pleading are within his personal knowledge. *Mason* v. *Brown*, 6 ib. 481; *Treadwell* v. *Fassett*, 10 ib. 184; *Boston Locomotive Works* v. *Wright*, 15 ib. 253.

12. The effect and true construction of the oath is, that so far as the matters in the pleading are within the knowledge of the party, they are true, and as to the residue, he is either informed or believes them to be true. *Truscott* v. *Dole*, 7 ib. 221.

13. If the complaint is improperly verified, the answer may be pleaded without verification. *Waggoner* v. *Brown*, 8 ib. 212.

14. If the verification of a pleading is deemed insufficient, the opposite party may test the question by omitting to verify his answer to it. *Strauss* v. *Parker*, 9 ib. 342.

15. The verification by an attorney who has the note sued on in his possession, is sufficient. *Smith* v. *Rosenthall*, 11 ib. 442; contra, *Meads* v. *Gleason*, 13 ib. 309.

16. It should follow the language of the code in the essential form there given. *Tibballs* v. *Selfridge*, 12 ib. 64.

17. In an action against husband and wife to set aside a deed of lands made to the wife by her father, the answer of the defendants should be verified by the wife as well as by the husband. *Youngs* v. *Seeley*, 11 ib. 395.

18. In what cases a verification may be made by a person other than the party to a record. *Meads* v. *Gleason*, 13 ib. 309.

19. If it be doubtful whether the verification be sufficient or not, it is better generally to treat it as sufficient, and make no question about it. *Wilkin* v. *Gilman*, 13 ib. 225.

20. Where an answer to a complaint in an action against the maker and two indorsers of a promissory note is verified by one of the defendants only, it is not sufficient; each should verify his answer whether put in unitedly or separately. *Hull* v. *Ball*, 14 ib. 305.

21. The complaint and answer were both verified by the respective attorneys, on information or belief, without stating the grounds, and both were held insufficient. The answer was allowed to stand. *Bank of Maine* v. *Buel*, ib. 311.

22. A verified pleading must be construed so as to make all its parts, if possible, harmonize with each other. *Ryle* v. *Harrington*, 4 Abbott, 421.

23. The defendant is not excused from verifying his answer to a sworn complaint on the ground that the complaint charges him with fraud in the making of the assignment which it is the object of the action to have set aside. *Wolcott* v. *Winston*, 8 ib. 422.

56. It shall not be necessary for a party to set forth in a pleading the items of an account therein alleged, but he shall deliver to the adverse party, within five days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court, or a judge thereof, or a county judge, may order a further

account, when the one delivered is too general, or is defective in any particular.

1. The party who is not satisfied with the bill should return it and move for another. It is too late to object at the trial. *Dennison* v. *Smith*, 1 Cal. 437.

2. This account may be enforced by motion at any time before trial. *Yates* v. *Bigelow*, 9 How. Pr. 186.

3. An order for a bill of items, although accompanied by a stay of proceedings, no longer operates of itself as formerly, to enlarge the time of the defendants to plead. *Platt* v. *Townsend*, 3 Abbott, 9.

4. A plaintiff is not bound, in giving a bill of particulars, to furnish offsets or payments which he has volunteered to credit defendant, in his complaint. *Williams* v. *Shaw*, 4 ib. 209.

57. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the court on motion of any person aggrieved thereby.

1. When the husband and wife are nominally joined as plaintiffs, but the cause of action as set forth in the complaint was a contract only with the husband, the name of the wife should be stricken out as surplusage. *Warner* v. "*Uncle Sam*," 9 Cal. 697.

2. On a motion to strike out, the papers should point out the precise parts at which the objections are aimed. *Benedict* v. *Dake*, 6 How. Pr. 352.

3. This motion is not a substitute for demurrer. *Harlow* v. *Hamilton*, ib. 475; *Bement* v. *Wisner*, 1 Code R., N. S., 143.

58. In an action for the recovery of real property, such property shall be described, with its metes and bounds, in the complaint.

1. Where a declaration describes land by a certain name, this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence. *Castro* v. *Gill*, 5 Cal. 40.

2. Actions for the foreclosure of a mortgage are not governed by this section. *Emeric* v. *Tams*, 6 ib. 155.

3. The following notice of a mechanic's lien does not contain such a description of the premises as the statute contemplates: "A dwelling house lately erected by me, for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot No. ——." The fact that Conner owned no other building on that street, would not cure the defect. *Montrose* v. *Conner*, 8 ib. 344.

4. A complaint defective in a proper description is demurrable. *Duffy* v. *Brady*, 4 Abbott, 432.

59. In pleading a judgment, or other determination of a court or officer of especial jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be

stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial the facts conferring jurisdiction.

1. It is a good defense to an action upon a judgment, whether brought by the original judgment creditor or his assignee, that the judgment was fraudulently obtained. *Dobson* v. *Pearce*, 2 Kern, 156; 1 Abbott, 97.

60. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall establish on the trial the facts showing such performance.

1. When the declaration states a condition precedent, and fails to aver performance, the defect must be taken advantage of by demurrer. *Happe* v. *Stout*, 2 Cal. 460.

2. The allegation that plaintiff fully performed on his part all the conditions of his contract, is sufficiently explicit. *Cal. Steam. Nav. Co.* v. *Wright*, 6 ib. 258.

3. In a complaint upon a bond by a defendant in an action, either for the delivery of property replevied, or the release of property attached, the conditions precedent of the bond must be set forth in the complaint. *Palmer* v. *Melvin*, ib. 651; *Chambers* v. *Waters*, 7 ib. 390; *Nickerson* v. *Chatterton*, ib. 568.

4. Where a right of action is to accrue upon the performance of an act, that performance must be averred in order to recover, as when payment of a debt is a condition precedent to plaintiff's right to recover on certain notes, the payment must be averred. *Rogers* v. *Cody*, 8 ib. 324.

5. Where a person by his contract engages to do an act, performance is not excused by an inevitable accident. Under an averment of performance of a covenant, evidence in excuse of non-performance is inadmissible. A condition precedent must be strictly performed, to entitle a party to recover. *Oakley* v. *Morton*, 1 Kern. 25.

6. Facts showing performance are to be stated; not circumstances, which are mere evidence; nor mere legal conclusions. *Hatch* v. *Peet*, 23 Barb. 575.

61. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the court shall thereupon take judicial notice thereof.

62. In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published or spoken concerning the plaintiff; and if

such allegation be controverted, the plaintiff shall establish on the trial that it was so published or spoken.

1. When the words are charged to have been spoken of and concerning the defendant, as a clerk or tradesman, which it is alleged was his subsistence, it is unnecessary to allege special damage. *Butler* v. *Howes*, 7 Cal. 87.

2. A variance between the date of the libel as set forth and as proven is immaterial unless the defense is misled by it. *Thrall* v. *Smiley*, 9 ib. 529.

3. The defendant may prove the reply by plaintiff immediately after defendant uttered the slanderous words. *Bradley* v. *Gardner*, 10 ib. 371.

4. Where the answer contained, 1st, a denial of the publication, and 2d, matter in justification and excuse, and the plaintiff demurred to the answer for insufficiency, specifying as grounds of demurrer objections only to the matter of justification and excuse, and judgment was given for the plaintiff on the demurrer; held, that the demurrer had reference only to the portion of the answer objected to, and that by the judgment the denial of the publication was not stricken out of the answer. *Matthews* v. *Beach*, 4 Seld. 173.

5. The time of uttering the slander, as alleged in the complaint, may be departed from in evidence. Such a variance is wholly immaterial. *Potter* v. *Thompson*, 22 Barb. 87.

6. If the slander be spoken of a married woman, and the words be actionable *per se*, the husband and wife must join in the action; if not actionable *per se*, the husband must sue alone. *Klein* v. *Hentz*, 2 Duer, 633.

7. The jury are at liberty to give exemplary damages, if the evidence satisfies them that the defendant published the libel with intent to injure the character or feelings of the plaintiff, or to break up his business. *Bennett* v. *Fry*, 4 ib. 247.

8. A statement of the tenor and effect of the words complained of, in an action for slander, is bad pleading. The words spoken should be stated. *Forsyth* v. *Edmiston*, 5 ib. 653; 2 Abbott, 430.

9. Several causes of action in slander cannot be united in the same complaint, unless they are separately stated. *Pike* v. *Van Wormer*, 5 How. Pr. 171.

10. It is not irrelevant for the plaintiff to allege the facts which he would be allowed upon the trial to prove in support of his action. *Deyo* v. *Brundage*, 13 ib. 221.

11. The office of an innuendo is to connect the words, published or spoken, with the persons or facts, and extrinsic circumstances previously named, and set forth in the inducement, and to explain their application thereto; and being merely explanatory, cannot enlarge the sense of words, or supply or alter them when they are deficient. *Blaisdell* v. *Raymond*, 14 ib. 265.

12. The complaint, consisting in words not on their face libelous, must distinctly aver the extrinsic fact on which plaintiff relies to show the alleged libelous character of the words complained of, and it is not sufficient that this fact is alleged by way of innuendo. *Caldwell* v. *Raymond*, 2 Abbott, 193.

13. It is not necessary to set out the whole of the obnoxious publication, but the pleader may extract only particular passages complained of, provided their sense be clear and distinct. *Culver* v. *Van Anden*, 4 Abbott, 375.

14. Where the words alleged in a complaint for libel are fairly susceptible of a construction which would render them libelous, the complaint will be sustained upon demurrer, although the words may be interpreted in a way which would render them innocent. *Wesley* v. *Bennett*, 5 ib. 498.

63. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

1. The answer must aver the truth of defamatory matter charged to constitute a justification. It is not sufficient to set up facts which only tend to establish the truth of such matter. Without an averment of its truth, the facts detailed can only avail in mitigation of damages. *Thrall* v. *Smiley*, 9 Cal. 529.

2. The defendant may prove, in mitigation of damages, facts and circumstances which disprove malice, although they tend to establish the truth of the defamatory charge. It is not necessary that the answer should allege the truth of the charge complained of, to entitle the defendant to aver and prove such facts and circumstances to reduce the amount of damages. *Bush* v. *Prosser*, 1 Kern. 347.

3. Accordingly, where in an action for charging the plaintiff with keeping a house of ill-fame, the answer denied the complaint, and as a partial defense alleged lewd and lascivious conduct by the plaintiff's family, not amounting to a justification of the charge; held, that the evidence of such conduct was competent to reduce the amount of damages. Ib.; *Anonymous*, 6 How. Pr. 160; *Heaton* v. *Wright*, 10 ib. 79; *Van Benschoton* v. *Yaple*, 13 ib. 97.

4. The defendant may allege, in his answer, the truth of the charge, in justification, and also facts tending to prove its truth, in mitigation of damages. *Bisbey* v. *Shaw*, 2 Kern, 67.

5. Where the defendant denies the charges in the complaint, he cannot set out in his answer matters in mitigation of damages, which do not constitute a defense to the action, or which could not be proven on the trial. *Graham* v. *Stone*, 6 How. Pr. 15.

6. In pleading a defense, mitigating circumstances may be alleged in justification, but not otherwise. Ib.; *Buddington* v. *Davis*, ib. 401.

7. In slander, an answer *justifying* the speaking of the words, must confess the speaking thereof. *Anibal* v. *Hunter*, ib. 255; *Ormsby* v. *Douglas*, 2 Abbott, 407.

8. The defendant may prove the plaintiff's general bad character, in mitigation of damages, whether he justifies or not. *Stiles* v. *Comstock*, 9 How. Pr. 48.

64. [1855.*] The plaintiff may unite several causes of action in the same complaint, when they all arise out of:

1st. Contracts, express or implied; or,

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* Statutes of 1855, 196.

2d. Claims to recover specific real property, with or without damages, for the withholding thereof, or for waste committed thereon, and the rents and profits of the same; or,

3d. Claims to recover specific personal property, with or without damages, for the withholding thereof; or,

4th. Claims against a trustee by virtue of a contract, or by operation of law; or,

5th. Injuries to character; or,

6th. Injuries to person; or,

7th. Injuries to property. But the causes of action so united shall all belong to only one of these classes, and shall affect all the parties to the action, and not require different places of trial, and shall be separately stated.

Provided, however, that an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character, or to the person.

Consolidation of actions, see section 526.

1. If several causes of action are improperly joined, the objection must be taken either by demurrer or answer, or the objection will be deemed to have been waived. *Macondray* v. *Simmons*, 1 Cal. 393.

2. Indebitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title; or by one of two litigant parties claiming the land. This action depending not upon the validity of plaintiff's title, but upon a contract expressed or implied. *Sampson* v. *Shaeffer*, 3 Cal. 196.

3. The right to recover for use and occupation is founded on contract alone. *O'Conner* v. *Corbitt*, 3 Cal. 370.

4. Value of property destroyed, and damages for the same, may be joined. *Tendesen* v. *Marshall*, ib. 440.

5. A plaintiff has a right to waive a tort as against factors, and to bring his action to compel them to account, and for the net proceeds arising from the sales. *Lubert* v. *Chauviteau*, ib. 458.

6. Damages for a personal tort cannot be united with a demand properly cognizable in a court of equity. *Mayo* v. *Madden*, 4 Cal. 27.

7. Plaintiff may sue for real property, damages for withholding it, rents and profits in the same action. *Sullivan* v. *Davis*, ib. 291.

8. It is improper to join an action of trespass, *quare clausum fregit*, with ejectment and prayer for relief in chancery. *Bigelow* v. *Gove*, 7 ib. 133.

9. Damages in addition to the penalty may be recovered in one action against a sheriff for a failure to execute and return process. *Pearkes* v. *Freer*, 9 Cal. 642.

10. The provisions of the second subdivision sustained. *Boles* v. *Cohen*, Cal. Jan. T. 1860.

11. A complaint connecting several causes of action, all of which belong to one of the classes mentioned in this section, and affect all the parties to the action, and do not require separate places of trial, cannot be demurred to on the ground that such causes of action are improperly united, merely because they are not separately stated. The remedy is by motion that the complaint be made more definite and certain, so as to show on its face what is relied upon as constituting a separate cause of action. *Harsen* v. *Bayaud*, 5 Duer, 656.

12. Several causes of action can properly be united in one complaint only where they each affect *all* the parties to the action. *Lexington and Big Sandy R. R. Co.* v. *Goodman*, 15 How. Pr. 85.

13. Certain securities were deposited by the owner with a firm as agents to sell them or negotiate loans upon them, and the agents disposed of them to various persons, in violation of their trust: held, that one cause of action would not lie against all the defendants; there was no community of interest between them. *Lexington and Big Sandy R. R. Co.* v. *Goodman*, 5 Abbott, 493.

14. A creditor's bill was filed to set aside various fraudulent assignments alleged to hinder and delay the creditors of the insolvent: held, upon demurrer by the assignee, that the various transferees could not be joined in the action, and that the several causes of action had been improperly united. *Reed* v. *Stryker*, 6 ib. 109.

15. A cause of action for malicious prosecution may be joined with a cause of action for slander. *Watson* v. *Hazzard*, 3 Code R. 218.

16. Several causes of action arising on several judgments, may be joined in one action. *Bank of N. America* v. *Suydam*, 1 Code R., N. S., 325.

17. Distinct accounts between the same parties may be sued upon separately. *Secor* v. *Sturgis*, 2 Abbott, 69.

65. [1854, 1860.*] Every material allegation of the complaint, *or answer*, not specifically controverted by the answer *or replication*, shall, for the purposes of the action, be taken as true. The allegation of new matter in the *replication* shall, on trial, be deemed controverted by the adverse party.

Stat 1861 p 494

1. A general and sweeping denial in a verified answer is not sufficient to controvert specifically each material allegation of the complaint. *Dewey* v. *Bowman*, 8 Cal. 145; *Humphries* v. *McCall*, 9 Cal. 59.

2. The complaint verified set forth that the plaintiffs are owners and entitled to the possession of certain mining claims therein described, and that the defendants wrongfully and unlawfully entered upon and dispossessed the plaintiffs, as alleged in the complaint. The answer denies specifically the allegations of ownership and right of possession, and denies that the defendants wrongfully and unlawfully entered and dispossessed the plaintiffs. The facts of entry and ouster are the only issuable facts presented in this allegation, and in the absence of a denial in positive and unequivocal terms, they

* Statutes of 1860, 000.

are for the purposes of the action, to be taken as true. *Busenius* v. *Coffee*, Cal. July T. 1859.

66. A material allegation in a pleading is one essential to the claim or defense, and which could not be stricken from the pleading without leaving it insufficient.

1. An averment of copartnership is immaterial in a complaint, when the execution of the note sued on is not controverted, and becomes the material issue in the action. It is not essential to the claim. *Whitwell* v. *Thomas*, 9 Cal. 499.

2. *Mayor of Albany* v. *Cunliff*, 2 Coms. 165.

67. [1854, 1860.*] After demurrer, and before the trial of issue on demurrer, either party may, within ten days, amend any pleading demurred to, of course, and without costs, filing the same as amended, and serving a copy thereof upon the adverse party or his attorney, who shall have ten days to answer, *reply* or demur thereto; but a party shall not so amend more than once. When a demurrer to a complaint *or answer* is overruled, and there is no answer *or replication* filed, the court may, upon such terms as shall be just, and upon payment of costs, allow an answer *or replication to be filed.* If a demurrer to the *replication* be overruled, the facts alleged in the *replication* shall still be considered as denied.

1. Where the complaint is defective, the court should sustain the demurrer, with leave to the plaintiff to amend his complaint, and if the plaintiff then declines, final judgment should be given. *Gallagher* v. *Delaney*, 10 Cal. 410.

2. The party desiring the amendment after demurrer sustained, must make his motion to the court, and he cannot object on appeal that he was not permitted to amend when he made no offer. *Smith* v. *Yreka Water Co.*, Cal. Oct. T. 1859.

3. A pleading which does not admit of an answer cannot be amended under this section. *Plumb* v. *Whipples*, 7 How. Pr. 411.

68. [1853†.] The court may, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceedings by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, and may, upon like terms, enlarge the time for an answer or demurrer, or demurrer to an answer filed. The court may likewise, upon affidavit

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* Statutes of 1860, 000. † Statutes of 1853, 276.

showing good cause therefor, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars; and may, upon like terms, allow an answer to be made after the time limited by this act: and may, upon such terms as may be just, and upon payment of costs, relieve a party or his legal representatives from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. When, from any cause, the summons and a copy of the complaint in an action have not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant or his legal representatives, at any time within six months after the rendition of any judgment in such action, to answer to the merits of the original action.

1. The court may on trial amend by adding or striking out parties. *Acquital* v. *Crowell*, 1 Cal. 191; *Polk* v. *Coffin*, 9 Cal. 56.

2. Great latitude is given to the courts by our statutes in amending and altering pleadings. *Polock* v. *Hunt*, 2 Cal. 193; *Cooke* v. *Spears*, ib. 409; *Stearns* v. *Martin*, 4 ib. 227; *Smith* v. *Yreka Water Co.*, Cal. Oct. T. 1859.

3. The discovery of a fraud after suit brought, would entitle plaintiff so to shape his action as to include it. *Truebody* v. *Jacobson*, 2 Cal. 269.

4. An amendment should be allowed or directed to conform the pleadings to the facts which ought to be in issue, in order to enable the court to decree fully on the merits. *Connalley* v. *Peck*, 3 Cal. 75; *Barth* v. *Walther*, 4 Duer, 228.

5. A refusal to allow an amendment is presumed to be right, unless the character of the proposed amendment is shown in the records. *Jessup* v. *King*, 4 Cal. 331.

6. It is always within the power of a court, when exercising proper discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. *Wood* v. *Fobes*, 5 Cal. 62.

7. An action in assumpsit cannot be changed into an action in tort by amendment of complaint. *Ramirez* v. *Murray*, 5 ib. 222.

8. A defendant may at any time, within six months, come in and open a default, and answer to the merits of the action, if he has not been personally served with process. *Guy* v. *Ide*, 6 Cal. 99; *Pico* v. *Carillo*, 7 ib. 30; *Shaw* v. *McGregor*, 8 ib. 521; *Ware* v. *Robinson*, 9 ib. 107.

9. There must be sufficient grounds set forth in the affidavit, as mistake, surprise, or excusable neglect, to authorize the court to set aside the judgment by default, after personal service. *Harlan* v. *Smith*, 6 ib. 173.

10. After a motion for a non-suit the court might allow an amendment of a declaration if it does not operate as a surprise upon the defendants. *Farmer* v. *Cram*, 7 ib. 135.

11. Ignorance of the law in not knowing that an answer must be filed in ten days, is not excusable neglect. *Chase* v. *Swain*, 9 ib. 130.

12. The plaintiff, in one count, in his complaint, claimed to recover possession of a draft wrongfully detained, and in another count claimed to recover possession of the money obtained on the draft. The evidence showed that the defendant as his agent came lawfully into possession of the money on the draft, which upon demand he failed to deliver: held, that this variance could not be amended, as there was a failure to prove the alleged causes of action in their entire scope and meaning. *Walter* v. *Bennett*, 16 New York, 250.

13. This section was intended mainly, if not solely, to allow amendments in order to sustain a judgment, not for the purpose of reversing it. *Gasper* v. *Adams*, 24 Barb. 287.

14. An amended pleading takes the place of and supersedes the original. *Seneca Co. Bank* v. *Garlinghouse*, 4 How. Pr. 174.

15. An order made by a judge at chambers, enlarging the time to answer, is an extension of the time to demur. *Brodhead* v. *Brodhead*, ib. 308.

16. Being allowed to come in and defend, does not of itself open the judgment, nor stay proceedings upon the execution. *Carswell* v. *Neville*, 12 ib. 445.

17. It is only when the purpose of the amendment is to conform the pleadings or proceedings to the facts proven, that the court is restricted from allowing an amendment which changes the nature of the claim or defense. *Daguerre* v. *Orser*, 3 Abbott, 86.

18. Leave will not be granted to file a supplemental complaint which alleges any fact known to the plaintiff at the time of commencing his action. *McMahon* v. *Allen*, ib. 89.

19. Under the authority in all cases to demur to the sufficiency of the answer, the defendant may in all cases amend his answer as of course. *Townsend* v. *Platt*, ib. 323.

20. The court has power to open a judgment by default in case of surprise or excusable neglect. *Mann* v. *Provost*, ib. 446.

21. The power of amendment, either before or after judgment, by adding or striking out names of the parties, is comprehensive, and includes almost all cases which can arise and call for the interposition of the court. *Sherman* v. *Fream*, 8 ib. 33.

69. When the plaintiff is ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly.

1. *Morgan* v. *Thrift*, 2 Cal. 562.

2. The name of the defendant cannot be changed after service, without notice. *M'Nally* v. *Mott*, 3 ib. 235: *Smith* v. *Curtis*, 7 ib. 584.

3. If the name be altered, and the party afterwards appear and answer, the alteration will be held immaterial. Ib.

4. The summons was issued against John Doe, and returned served on John Doe *alias* Westfall; Westfall made no appearance or defense, which was equivalent to an admission that he was the party intended to be sued, and judgment by default was properly entered against him. *Curtis* v. *Herrick*, Cal. Oct. T. 1859.

5. It is not allowable for a plaintiff to use a fictitious name at his discretion, but only when he is ignorant of the true name. *Crandall* v. *Beach*, 7 How. Pr. 271.

70. In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

71. The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect.

1. The error in an answer entitled in the "supreme" instead of the "superior" court, may be disregarded. *Williams* v. *Sholto*, 4 Sand. 641.

TITLE V.

OF THE PROVISIONAL REMEDIES IN CIVIL ACTIONS.

CHAPTER I.

ARREST AND BAIL.

72. No person shall be arrested in a civil action, except as prescribed by this act.

73. The defendant may be arrested as hereinafter prescribed, in the following cases arising after the passage of this act: (*a*)

(*a*) STATUTES OF 1850, 407; WOOD'S DIGEST, 252, ART. 1381.

An act for the relief of persons imprisoned on civil process. Passed April 22, 1850.

1. Every person confined in jail, on an execution issued on a judgment rendered in a civil action, shall be discharged therefrom upon the conditions hereinafter specified.

2. Such person shall cause a notice in writing to be given to the plaintiff, his agent, or attorney, that at a certain time and place he will apply to the judge of the district court of the county in which such person may be confined; or, in case of his absence, or

1st. In an action for the recovery of money or damages on a cause of action arising upon contract express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors, or when the action is for willful injury to person, to character, or to property, knowing the property to belong to another.

2d. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity, or for misconduct or neglect in office, or in a professional employment; or for a willful violation of duty.

3d. In an action to recover the possession of personal property, unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff.

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inability to act, to the judge of the county court of the county in which such person may be imprisoned, for the purpose of obtaining a discharge from his imprisonment.

3. Such notice shall be served upon the plaintiff, his agent or attorney, one day at least before the hearing of the application, in cases where the plaintiff, his agent or attorney, lives within twenty miles of the place of hearing; and one day shall be added for every additional twenty miles that such person may reside from the place of hearing.

4. At the time and place specified in the notice, such person shall be taken before such judge, who shall examine him under oath concerning his estate, and property, and effects, and the disposal thereof, and his ability to pay the judgment for which he is committed; and such judge shall also hear any other legal and pertinent evidence that may be produced by the debtor or the creditor.

5. The plaintiff in the action may, upon such examination, propose to the prisoner any interrogatories pertinent to the inquiry, and they shall, if required by him, be proposed and answered in writing; and the answer shall be signed and sworn to by the prisoner.

6. If, upon the examination, the judge shall be satisfied that the prisoner is entitled to his discharge, such judge shall administer to him the following oath, to wit: "I do solemnly swear that I have not any estate, real or personal, to the amount of fifty dollars, except such as is by law exempted from being taken in execution; and that I have not any other estate now conveyed or concealed, or in any way disposed of, with design to secure the same to my use, or to defraud my creditors, so help me God."

7. After administering the oath, the judge shall issue an order that the prisoner be discharged from custody, if he be imprisoned for no other cause; and the officer, upon

4th. When the defendant has been guilty of fraud in contracting the debt, or incurring the obligation for which the action is brought; or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought.

5th. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

1. One partner cannot arrest another, suing to recover money. *Soule* v. *Hayward*, 1 Cal. 345; *Cary* v. *Williams*, 1 Duer, 667.

2. A party will be discharged from arrest where the process, though proper in form, has been issued in an improper case. *Soule* v. *Hayward*, 1 Cal. 345.

3. The representations, if false or fraudulent, must precede the contract. *Snow* v. *Halstead*, ib. 359.

4. In a suit to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal, and a refusal on his part to pay. An arrest in such case is prohibited by section 15, art. I, of the constitution. *Ex parte Holdforth*, ib. 438.

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the service of such order, shall discharge the prisoner forthwith, if he be imprisoned for no other cause.

8. If such judge should not discharge the prisoner, he may apply for his discharge at the end of every succeeding ten days, in the same manner as above provided, and the same proceedings shall thereupon be had.

9. The prisoner after being so discharged shall be forever exempted from arrest or imprisonment for the same debt, unless he shall be convicted of having willfully sworn falsely upon his examination before the judge, or in taking the oath before prescribed.

10. The judgment against any prisoner, who is discharged as aforesaid, shall remain in full force against any estate which may then, or at any time afterwards, belong to him; and the plaintiff may take out a new execution against the goods and estate of the prisoner in like manner as if he had never been committed.

11. The plaintiff in the action may at any time order the prisoner to be discharged and he shall not thereafter be liable to imprisonment for the same cause of action.

12. Whenever a person is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor, his agent, or attorney, shall advance to the jailor, within twenty-four hours after such commitment, sufficient money to pay for the support of said prisoner during the time for which he may be imprisoned; and in case the money should not be so advanced, or if, during the time the prisoner may be in confinement, the money should be expended in the support of such prisoner, and the creditor should neglect, for twenty-four hours, to advance such further sum as might be necessary for his support, the jailor shall forthwith discharge such prisoner from custody, and such discharge shall have the same effect as a discharge by order of the creditor.

5. A person once arrested and discharged, cannot be re-arrested in the same action. *McGilvery* v. *Morehead*, 2 Cal. 607.

6. The judgment should find the facts of the fraud upon which the defendant can only be imprisoned on final process, or his bail become forfeit. *Matoon* v. *Eder*, 6 ib. 57; *Davis* v. *Robinson*, 10 ib. 411.

7. The provision of arrest for willful injury to person or character, is in conflict with the constitution. *Ex parte Prader*, 6 ib. 239.

8. 2d. An allegation that the money was collected and received by the defendant, as the agent *or* attorney in fact of the plaintiff, is in the alternative form, and cannot be permitted. The character or capacity must be averred in direct and positive terms, or the charge must fall. *Porter* v. *Hermann*, 8 ib. 619.

9. 4th. Fraud may consist in the misrepresentation or concealment of material facts, and may be inferred from the circumstances and conditions of the parties contracting. *Belden* v. *Henriquez*, ib. 87.

10. The word "obligation" is here used equivalent to "legal liability or legal duty." *Crandall* v. *Ryan*, 15 How. Pr. 48; 5 Abbott, 162.

11. A person who purchases goods upon credit obtained upon the faith of his representations that he is solvent, when in fact he is not solvent, is not liable to arrest in an action therefor, if he believed his representations were true at the time he made them. *Birchell* v. *Straus*, 8 Abbott, 53.

74. An order for the arrest of the defendant shall be obtained from a judge of the court in which the action is brought, or from a county judge.

75. The order may be made whenever it shall appear to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists; and that the case is one of those mentioned in section seventy-three. The affidavit shall be either positive, or upon information and belief; and when upon information and belief, it shall state the facts upon which the information and belief are founded. If an order of arrest be made, the affidavit shall be filed with the clerk of the county.

1. The affidavit must contain sufficient facts, and must not refer to the complaint for the matter, without setting forth sufficient of itself. *McGilvery* v. *Morehead*, 2 Cal. 607.

2. It is sufficient if the circumstances set forth in the affidavit would induce a reasonable belief that fraud was committed. *Southworth* v. *Resing*, 3 ib. 377.

3. An affidavit on information and belief, followed by an averment of the facts on which the belief is founded, also stated on information and belief, is sufficient. *Matoon* v. *Eder*, 6 Cal. 57.

4. Until the complaint is filed, and suit thereby commenced, no order of arrest can issue. *Ex parte Cohen*, ib. 318.

5. When the circumstances authorizing an arrest, occur subsequently to the filing of the complaint, application should be made to the court either to amend the original, or to file a supplemental complaint, so as to set forth the facts upon which execution against the person of the defendant will be asked, in the enforcement of the judgment sought. *Davis* v. *Robinson*, 10 Cal. 411.

6. Putting in and perfecting bail is a waiver of all defects in the affidavit. *Stewart* v. *Howard*, 15 Barb. 26.

7. In the affidavit upon which an order of arrest is to be founded, two things must be made to appear; that a sufficient cause of action exists, and that it is among those specified in section seventy-three. It is not sufficient for a party to state that "his case is one of those mentioned in section seventy-three." He must state the facts. *Pindar* v. *Black*, 4 How. Pr. 95.

8. In an affidavit for the arrest of the defendant for fraudulently obtaining goods, the facts within the knowledge of the plaintiff must be stated positively. What is stated on information, should be set out particularly, and good reasons given why a positive statement cannot be procured. *Whitlock* v. *Roth*, 5 ib. 143.

9. It is not necessary to state in the affidavit for an arrest, that a summons has been issued. *Conklin* v. *Dutcher*, 5 ib. 386.

10. The affidavit must state the facts and circumstances to establish the grounds of the application for the arrest; stating the single fact that the defendant intends to depart from the state with intent to defraud his creditors, is not sufficient legal evidence. *Furman* v. *Walter*, 13 ib. 348.

11. The affidavits presented must make out a *prima facie* case, for the arrest. An affidavit upon information and belief is clearly insufficient, unless the quality and means of the information are set forth, to enable the judge to decide whether the belief is well founded. *Crandall* v. *Bryan*, 15 ib. 48.

12. Where the right to arrest the defendant is derived from the nature of the action, *e. g.*, in an action for embezzlement, the defendant will not be allowed upon a motion to discharge from arrest, affidavits to show that there is no cause of action. *Geller* v. *Beixas*, 4 Abbott, 103.

13. Where an order of arrest is granted on plaintiff's own affidavit, and a discharge is moved for solely on the original papers, the affidavit of plaintiff being uncontradicted is to be taken as true; but it is to be strictly construed against plaintiff. The defendant was discharged from arrest on the ground that the allegations of the plaintiff's affidavit on which alone the arrest was ordered, were insufficient to establish an intent on the part of the defendant to defraud his creditors. *Hathorne* v. *Hall*, ib. 227.

76. Before making the order, the judge shall require a written undertaking on the part of the plaintiff, with sureties, to the effect that if the defendant recover judgment, the plaintiff will pay all costs and charges that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least five hundred dollars. Each of the sureties shall annex to the undertaking an affidavit

that he is a resident and householder, or freeholder, within the state, and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking shall be filed with the clerk of the court.

See section 650.

1. When a foreign state is a plaintiff, an undertaking accompanying an order of arrest, signed and acknowledged by its resident minister on the part of the plaintiff, is a valid undertaking within the provisions of the code. *Republic of Mexico* v. *Arrangoiz*, 5 Duer, 634.

2. A defective undertaking may be allowed to be amended, on motion to discharge from arrest. *Bellinger* v. *Gardner*, 2 Abbott, 441.

3. The undertaking for an arrest need not be executed by the plaintiff personally. *Askins* v. *Hearns*, 3 ib. 184.

77. The order may be made to accompany the summons, or any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending.

See section 210, 3d.

78. The order of arrest, with a copy of the affidavit upon which it is made, shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him the copy of the affidavit; and also, if desired, a copy of the order of arrest.

79. The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law.

1. The arrest before judgment is only intended to secure the presence of the defendant until final judgment. *Davis* v. *Robinson*, 10 Cal. 411.

80. The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

81. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the

amount mentioned in the order of arrest; that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein; or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

See section 650.

1. The sheriff is bound to take bail provided they are sufficient. If he refuses, he is liable. *Richards* v. *Porter*, 7 John. 137; *Dash* v. *Van Kleeck*, ib. 477.

82. At any time before judgment, or within ten days thereafter, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested.

1. Where a party offered to surrender himself in discharge of his sureties, held to be a good surrender, and a discharge of the sureties from all liability. *Babb* v. *Oakley*, 5 Cal. 93.

2. The sureties on the bail-bond of a defendant, arrested in a civil action, are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. A surrender within ten days after execution, is a sufficient compliance with the statute. *Allen* v. *Breslauer*, 8 ib. 552.

3. A judgment by default will not authorize the entry of a judgment on the allegations of fraud, if the summons fail to apprise the defendant of this fact. *Porter* v. *Hermann*, ib. 619.

83. For the purpose of surrendering the defendant, the bail at any time or place before they are finally charged, may themselves arrest him; or by a written authority, endorsed on a certified copy of the undertaking, may empower the sheriff to do so. Upon the arrest of the defendant by the sheriff, or upon his delivery to the sheriff by the bail, or upon his own surrender, the bail shall be exonerated: provided, such arrest, delivery or surrender, take place before the expiration of ten days after judgment, but if such arrest, delivery or surrender be not made within ten days after judgment, the bail shall be finally charged on their undertaking, and be bound to pay the amount of the judgment within ten days thereafter.

1. The authority to arrest need not be signed by all the bail. The authority of some is good. *Ex parte Taylor*, 7 How. Pr. 212.

84. [1854.*] If the bail neglect or refuse to pay the judgment

* Statutes of 1854, 84.

within ten days after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

1. Sections 83 and 84 fully discussed. *Matoon* v. *Eder*, 6 Cal. 57.

2. Bail are estopped from controverting the right of plaintiff to arrest. *Gregory* v. *Levy*, 12 Barb. 610; 7 How. Pr. 37.

85. The bail shall also be exonerated by the death of the defendant, or his imprisonment in a state prison; or by his legal discharge from the obligation to render himself amenable to the process.

86. Within the time limited for that purpose, the sheriff shall file the order of arrest in the office of the clerk of the court in which the action is pending, with his return endorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he shall retain in his possession until filed, as herein provided. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them, and the sheriff shall be exonerated from liability. If no notice be served within ten days, the original undertaking shall be filed with the clerk of the court.

87. Within five days after the receipt of notice, the sheriff or defendant may give to the plaintiff, or his attorney, notice of the justification of the same, or other bail, (specifying the places of residence and occupations of the latter) before a judge of the court or county judge, or county clerk, at a specified time and place; the time to be not less than five, nor more than ten days thereafter, except by consent of parties. In case other bail be given, there shall be a new undertaking.

88. The qualifications of bail shall be as follows:

1st. Each of them shall be a resident, and householder, or freeholder, within the county.

2d. Each shall be worth the amount specified in the order of arrest, or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge, or county clerk, on justification, may allow more than two sureties to justify severally, in amounts less

than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

See section 650.

89. For the purpose of justification, each of the bail shall attend before the judge or county clerk at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or county clerk in his discretion may think proper. The examination shall be reduced to writing, and subscribed by the bail, if required by the plaintiff.

90. If the judge or clerk find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed, and the sheriff shall thereupon be exonerated from liability.

91. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of the bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged out of custody.

92. The sheriff shall immediately after the deposit pay the same into court, and take from the clerk receiving the same, two certificates of such payment; the one of which he shall deliver or transmit to the plaintiff, or his attorney, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency.

93. If money be deposited, as provided in the last two sections, bail may be given, and may justify upon notice, at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

1. After giving bail, the money was attached before being refunded, and although it was proven to have belonged to a third person, and advanced until bail could be

obtained: held, that the money by being deposited became the property of the defendant, and liable to attachment. *Salter* v. *Weiner*, 6 Abbott, 191.

94. Where money shall have been deposited, if it remain on deposit at the time of the recovery of a judgment in favor of the plaintiff, the clerk shall, under the direction of the court, apply the same in satisfaction thereof; and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall, under like direction of the court, refund to him the whole sum deposited and remaining unapplied.

95. If, after being arrested, the defendant escape or be rescued, the sheriff shall himself be liable as bail; but he may discharge himself from such liability, by the giving and justification of bail, at any time before judgment.

1. A sheriff cannot be allowed to allege error either in the judgment or process as an excuse for an escape. *Hutchinson* v. *Brand*, 6 How. Pr. 73.

2. Where the bail given for the defendant upon his arrest are excepted to and do not justify, and no other bail are given, nor a deposit made, the sheriff becomes liable as bail. *Buckman* v. *Carnley*, 9 How. Pr. 180; *Sartos* v. *Merceques*, ib. 188.

3. The sheriff may as bail re-arrest the defendant without process. Ib.

96. If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be returned unsatisfied in whole or in part, the same proceedings may be had on his official bond, for the recovery of the whole or any deficiency, as in other cases of delinquency.

97. A defendant arrested may at any time before the justification of bail, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice to the plaintiff to vacate the order of arrest, or to reduce the amount of bail. If the application be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

1. A person once arrested and discharged cannot be re-arrested in the same action upon the same grounds. *McGilvery* v. *Morehead*, 2 Cal. 607.

2. A motion to vacate an order of arrest must be made before the bail have justified, if excepted to, or before the time to except expires. *O'Neil* v. *Durkee*, 12 How. Pr. 94; 2 Abbott, 383; *Gaffney* v. *Burton*, 12 How. Pr. 516; *Bridgewater Paint Manufac-*

turing Co. v. *Messmore*, 15 ib. 12; *Dale* v. *Radcliff*, ib. 71; *Lewis* v. *Truesdell*, 1 Code R., N. S., 106; *Barker* v. *Dillon*, ib. 206.

3. On a motion to discharge, if the judge is satisfied of the fraud, he should of course deny the motion. *Chapin* v. *Seeley*, 13 How. Pr. 490; *Barron* v. *Sanford*, 14 ib. 443.

4. It is not a ground for vacating an order of arrest, that the case made by the complaint varies from that made by the affidavits, if the affidavits are themselves sufficient, and disclose a ground of arrest which is consistent with the allegations of the complaint. *Stelle* v. *Palmer*, 7 Abbott, 181.

5. Appeals from orders denying motions to vacate orders of arrest after the party is out on bail, are not to be encouraged. *Moers* v. *Martens*, 8 ib. 257.

98. If upon such application it shall satisfactorily appear that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appear that the bail was fixed too high, the amount shall be reduced.

CHAPTER II.

CLAIMS FOR DELIVERY OF PERSONAL PROPERTY.

99. The plaintiff, in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

1. For verdict under this provision, see sections 177, 200, 210.

2. Where the original taking of personal property is tortuous, no demand is necessary. *Ledley* v. *Hays*, 1 Cal. 160.

3. Where the taking is by an officer upon proper legal authority, a demand is necessary in order to make him liable in damages. *Daumiel* v. *Gorham*, 6 Cal. 43; *Taylor* v. *Seymour*, ib. 512; *Killey* v. *Scannell*, 12 ib. 73.

4. The measure of damages for property converted is the value thereof, with legal interest from the time of conversion, and when the value is fluctuating, the plaintiff may recover the highest value at the time of the conversion or at any time afterwards. *Nickerson* v. *Chatterton*, 7 Cal. 568; *Douglass* v. *Kraft*, 9 ib. 562; *Phelps* v. *Owens*, 11 ib. 22; *Andrews* v. *Durant*, 18 N. Y. 496.

5. The bailee of an officer who has the property in the custody of the law, and who has receipted for the same to the sheriff, agreeing to deliver it on demand, cannot afterwards set up title to the property in himself. *Bleven* v. *Freer*, 10 Cal. 173.

6. In an action by W. it appeared that the property sued for belonged to W. & F., and the jury returned a general verdict for defendants, and the court gave judgment accordingly: held, there was no error in the judgment. *Waldman* v. *Broder*, ib. 378.

7. In trover the plaintiff must either have the possession or the immediate right to

the possession of the property to enable him to recover. *Middlesworth* v. *Sedgwick*, 10 Cal. 392.

8. A judgment in replevin does not constitute a bar to an action in trover, the judgment not having been satisfied. *Nickerson* v. *California Stage Co.*, ib. 520.

9. The defendant may plead property in himself or in a stranger, or in any person other than plaintiff. *Pattison* v. *Adams*, Lalor's Supp. 426.

10. Forwarding merchants who have made advances for prior charges on goods consigned to them for transportation, have such an interest in the goods as entitles them to maintain this action against a third person to whom the goods were wrongfully delivered. *Fitzhugh* v. *Wiman*, 5 Seld. 559.

11. A right of action for the wrongful taking, and conversion of personal property, is assignable. *McKee* v. *Judd*, 2 Kern. 622; *Fay* v. *Troy and Boston R. R. Co.*, 24 Barb. 382.

12. One tenant in common of personal property, cannot maintain replevin against the other, to acquire possession. *Russell* v. *Allen*, 3 Kern. 173.

13. A party was in possession of a chattel without any title, when a creditor upon whose execution the sheriff had levied upon the chattel, and also after notice of the claim of the owner, indemnifies the sheriff against responsibility for a sale, and the sheriff thereupon sells the property, this creditor is liable in an action by the owner for its value, although the execution in his favor was satisfied by a sale of other property previous to the sale of the chattel. *Herring* v. *Hoppock*, 15 New York, 409.

14. This provisional remedy cannot be maintained against a party who has not in fact or in law the possession or control of the property claimed. *Roberts* v. *Randel*, 3 Sand. 707; 5 How. Pr. 327; *Brockaway* v. *Burnap*, 12 Barb. 347; *Drake* v. *Wakefield*, 11 How. Pr. 106.

15. The plaintiff must prove the legal title to be in himself, or a special property with a right to possession. *Dodworth* v. *Jones*, 4 Duer, 201.

16. The defendant may answer by general denial, and set up a justification also. *Hackley* v. *Ogman*, 10 How. Pr. 44.

17. This action is in the nature of the old writ of replevin. *Savage* v. *Perkins*, 11 ib. 17.

18. In an action where the defendant merely detains the property, a demand and refusal must be averred. *Fuller* v. *Lewis*, 13 How. Pr. 219; 3 Abbott, 383.

19. This action abates if the defendant dies before verdict or judgment. *Hopkins* v. *Adams*, 5 Abbott, 351.

100. Where a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1st. That the plaintiff is the owner of the property claimed (particularly describing it) or is lawfully entitled to the possession thereof;

2d. That the property is wrongfully detained by the defendant;

3d. The alleged cause of the detention thereof, according to his best knowledge, information and belief;

4th. That the same has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution, or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure; and,

5th. The actual value of the property.

1. The plaintiff having shown possession, it was competent under any rule of evidence, to cross-examine the witness, for the purpose of establishing the nature and character of the plaintiff's possession; to draw from him, if possible, the fact whether such possession was a mere cover to hide the defendant's property, and also, for the purpose of testing the witness's means of knowledge and information on this subject. *Thornburgh* v. *Hand*, 7 Cal. 554.

2. It is not necessary that the complaint should correspond with the affidavit as to the number and value of the articles claimed to be delivered. *Kerrigan* v. *Ray*, 10 How. Pr: 213.

3. A general appearance by defendants is a waiver of any irregularity in the affidavits on which the requisition is founded. *Hyde* v. *Patterson*, 1 Abbott, 248.

101. [1854.*] The plaintiff or his attorney may thereupon, by an endorsement in writing upon the affidavit, require the sheriff of the county where the property claimed may be, to take the same from the defendant.

1. The sheriff will, however, be liable to the owner, who has his legal remedy against any one for the taking, unless it be by virtue of legal process against him. *Rhodes* v. *Patterson*, 3 Cal. 469.

102. [1854.*] Upon a receipt of the affidavit and notice, with a written undertaking, executed by two or more sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may from any cause be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession

* Statutes of 1854 84.

the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; or if neither have any known place of abode, by putting them in the nearest post-office, directed to the defendant.

See section 650.

1. Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignees of the defendants can maintain an action upon it. *Wingate* v. *Brooks*, 3 Cal. 112.

2. In an action on the bond, the fact that defendant brought his action before an incompetent tribunal is no defense, and the plea that the title of property so replevied is in him, is bad. *McDermott* v. *Isbell*, 4 ib. 113.

3. Where the defendant in a replevin suit failed to claim the return of the property in his answer, and on the trial, the jury found a verdict for the defendant, on which the court rendered judgment against plaintiff for costs, which was paid: held, that the payment of the judgment, as taken, was a complete discharge of plaintiff's sureties on the undertaking. *Chambers* v. *Waters*, 7 ib. 390.

4. This bond is liable for a return of the property, or for damages on a failure to return in whole or in part. *Ginaca* v. *Atwood*, 8 ib. 446.

5. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as a sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking, as required by section 102 of the code. The undertaking was executed by defendants R. and S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30th, 1854. On the eighteenth of February, 1855, executions in favor of other creditors of J. coming into the hands of H. as sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into court. H. then brought this suit against the sureties in the replevin bond: held, that the lien of T.'s attachment continued after the replevy of the goods by M. J. *Hunt* v. *Robinson*, 11 ib. 262.

6. When the same property came into the hands of H. as sheriff, the condition of the replevin bond, to return the property, was fulfilled. The primary object of the replevin suit is, the recovery of the thing itself. The value is received only in the alternative, that the property is not returned. The possession obtained by the plaintiff in replevin is only temporary. It does not divest the title or discharge the lien. In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. Ib.

7. A bond may be filed *nunc pro tunc* when the one given in the first instance is defective. *Newland* v. *Willits*, 1 Barb. 20; *Manly* v. *Patterson*, 3 Code R. 89.

8. Where the defendant appears, he waives the irregularity of the issuing the writ without a clerk's name to it. *Legate* v. *Lagrille*, 1 How. Pr. 13.

9. The sheriff must endorse his approval on the undertaking. *Burns* v. *Robbins*, 1 Code R. 62.

10. An assignee of the defendant in whose favor judgment is rendered, may maintain an action upon the undertaking of plaintiff. *Bowdoin* v. *Coleman*, 3 Abbott, 431.

11. If the defendant give the undertaking required in section 104, and claims a return of the property, the plaintiff, if a non-resident, will be required to give security for costs, and it is questionable whether an action would lie on this bond after a return of the property. *Gelch* v. *Barbaby*, 7 Abbott, 19.

103. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice in like manner as upon bail on arrest; and the sheriff shall be responsible for the sufficiency of the sureties until the objection to them is either waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

1. When the defendant, in an action to recover personal property, excepts to the sureties in the plaintiff's undertaking, if one fails to justify, and for that reason a new surety is substituted, a new undertaking must be executed. *Cobb* v. *Lackey*, 6 Duer, 648.

104. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in section one hundred and nine.

1. This bond is assignable by the sheriff. *Wingate* v. *Brooks*, 3 Cal. 112.

2. In an action on this bond it must be alleged that the defendant neither re-delivered the property, nor paid the value thereof, as recited in the judgment. *Nickerson* v. *Chatterton*, 7 ib. 568; *Chambers* v. *Waters*, ib. 390.

3. Where the defendant has required the return of the property, and given an undertaking, for such purpose; a judgment for plaintiff, in order to hold the sureties on the undertaking must be in the alternative, as required by sections 104, 177, and 210. *Nickerson* v. *Chatterton*, 7 ib. 568.

4. The liability of the sureties cannot be more than the value of the property, fixed by the judgment in the original suit. Ib.

5. In an action on this undertaking, it is not necessary to aver the issuing of an ex-

ecution against the property of the defendant, and its return unsatisfied. The sureties are bound absolutely for the payment of the judgment, and must see to it that such payment is made. *Slack* v. *Heath*, 4 E. D. Smith, 837.

105. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than five days, shall justify before a judge or county clerk, in the same manner as upon bail on arrest; and upon such justification, the sheriff shall deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he shall deliver the property to the plaintiff.

106. The qualification of sureties and their justification shall be such as are prescribed by this act, in respect to bail upon an order of arrest.

107. If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall publicly demand its delivery; if it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.

108. When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

1. The officer is estopped by his return from denying that he had the goods in his possession. *Kuhlman* v. *Orser*, 5 Duer, 242.

2. If the defendant has not excepted to the sufficiency of the sureties, and requires a return of the property, he must claim it within five days, or his right to a return is gone. *M'Cann* v. *Thompson*, 13 How. Pr. 381.

109. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the sheriff, the sheriff shall not be bound to keep the property, or deliver it to the plaintiff, unless the

plaintiff, on demand of him or his agent, indemnify the sheriff against such claim, by an undertaking, by two sufficient sureties, accompanied by their affidavits, that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders in the county; and no claim to such property by any other person than the defendant or his agent, shall be valid against the sheriff, unless so made.

See section 650.

1. This is the only way in which the third party can assert his claim. *Egerton* v. *Ross*, 6 Abbott, 189.

110. [1854.*] The sheriff shall file the notice, undertaking and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending, within twenty days after taking the property mentioned therein.

CHAPTER III.

INJUNCTION.

111. An injunction is a writ or order, requiring a person to refrain from a particular act. The order or writ may be granted by the court in which the action is brought, or by a judge thereof, or by a county judge; and when made by a judge may be enforced as the order of the court.

1. Abuse in injunction should be guarded against. *De Witt* v. *Hays*, 2 Cal. 463.

2. The writ of injunction can only be issued where the case is one of equity jurisdiction. *Minturn* v. *Hays*, 2 Cal. 590; *Coker* v. *Simpson*, 7 ib. 340.

3. An injunction operates to restrain not only the party enjoined but other courts on the ground of judicial comity. *Engels* v. *Lubeck*, 4 ib. 31.

4. An injunction is a mere remedial process, and where the party obtaining it has also obtained a judgment upon his cause, the court will not revise the propriety of granting the writ. *Hicks* v. *Davis*, 4 ib. 67.

5. An order of injunction whereby the bringing of an action is restrained, will be reversed, notwithstanding an injunction bond has been given. *King* v. *Hall*, 5 ib. 82.

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* Statutes of 1854, 84.

6. There is no prohibition to this grant of authority in the county judge, by the constitution, and the implication is decidedly otherwise. *Thompson* v. *Williams*, 6 Cal. 88; *Crandell* v. *Woods*, ib. 449; *Chard* v. *Stone*, 7 ib. 117; *Ruthrauff* v. *Kress*, Cal. July T. 1859.

7. An appeal does not lie from an order refusing to grant an injunction. *Richards* v. *McMillan*, 6 ib. 422. (See amendment to section 336.)

8. An injunction will not lie to restrain the collection of a judgment against plaintiff, because the judgment was for purchase money of land under covenant of title, while in fact the grantor had no title, as long as the purchaser remains in possession. *Jackson* v. *Norton*, 6 ib. 187.

9. A preliminary injunction cannot be sustained, where the equities of the complaint are denied by the answer. *Crandell* v. *Woods*, 6 ib. 449; *Blatchford* v. *New York and New Haven R. R. Co.*, 5 Abbott, 276.

10. An appeal does not lie from an order refusing to dissolve an injunction. *Martin* v. *Travers*, 7 Cal. 253. (See amendment to section 336.)

11. An appeal will not authorize *per se* a stay of injunction. *Merced Mining Co.* v. *Fremont*, ib. 130.

12. A writ of injunction will lie, to restrain trespass, in entering upon a mining claim, and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass, than to leave the plaintiff to his remedy at law. Moreover, it would be impossible to estimate, with any approach to accuracy, the damage done; and hence, the greater necessity of preventing what cannot be adequately compensated. The removal of gold from a mine is emphatically taking away the entire substance of the estate, and comes within that class of trespass in which injunctions are now universally granted. *Merced Mining Co.* v. *Fremont*, 7 ib. 317.

13. Where the complaint alleged that the defendants had dug a mining ditch, above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiff's ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: held, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker* v. *Simpson*, 7 ib. 340.

14. Where a party can obtain ample relief in the court whose proceedings he wishes to restrain, there is no reason for seeking an injunction in another tribunal, possessing only the same power. *Anthony* v. *Dunlap*, 8 Cal. 26; *Rickett* v. *Johnson*, 8 ib. 34; *Revalk* v. *Kraemer*, ib. 66; *Chipman* v. *Hibbard*, ib. 268; *Phelan* v. *Smith*, ib. 520; *Gorham* v. *Toomy*, 9 ib. 77; *Uhlfelder* v. *Levy*, ib. 607; *Grant* v. *Quick*, 5 Sand. 612; *Bennett* v. *Leroy*, 6 Duer, 683; 6 Abbott, 55.

15. Where several alleged fraudulent judgments are confessed in several courts, this rule does not apply, and it would not be necessary for a creditor to bring a different suit in each different court. *Uhlfelder* v. *Levy*, 9 Cal. 697.

16. A complaint must show that the suit cannot be brought in the county where the judgment is, to enable another court to enjoin the proceedings. Ib.

17. No particular form is necessary for a writ of injunction; the substantial thing is an authentic notification to the defendants of the mandate of the judge which they must then at their peril obey. *Summers* v. *Farish*, 10 Cal. 347.

18. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon. *Smith* v. *Wilson*, 10 Cal. 528.

19. An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where if the neglect were excusable, full relief might have been had on motion in the original action. *Borland* v. *Thornton*, 12 ib. 440.

20. The destruction of water courses are such grievances as call for the equitable remedy by injunction. *Corning* v. *Troy Factory*, 6 How. Pr. 89.

21. An injunction cannot issue in an action for a breach of covenant or agreement, restraining the defendant from carrying on a certain trade or profession within a certain time, in a certain place, where a certain sum as a penalty is named in the agreement, whether the defendant is solvent or insolvent. *Vincent* v. *King*, 13 ib. 234.

22. An injunction to restrain an apprehended trespass, is never allowed, except under very special circumstances. *Mayor of New York* v. *Conover*, 5 Abbott, 171.

112. An injunction may be granted in the following cases:

1st. When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.

2d. When it shall appear by the complaint or affidavit that the commission or continuance of some act during the litigation would produce great or irreparable [injury] to the plaintiff.

3d. When it shall appear during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action and tending to render the judgment ineffectual.

1. An injunction will not be granted when the plaintiff has another remedy of which he can avail himself without restraining the defendant. *Bedell* v. *McClellan*, 11 How. Pr. 172.

2. An injunction can only issue upon a complaint filed. Affidavits without a complaint are no proper basis for an order. *People* v. *Judges of N. Y. Common Pleas*, 3 Abbott, 181.

3. To entitle plaintiff to an injunction, his complaint must show that he will be entitled to final relief. *Crocker* v. *Baker*, 3 ib. 182.

4. 1st. A perpetual injunction to restrain defendants from raising their dam higher than the point designated was allowed. *Ramsay* v. *Chandler*, 3 Cal. 90.

5. An injunction to restrain the collection of a tax illegally laid, if there is a remedy at law, will not be granted. *Robinson* v. *Gaar*, 6 Cal. 273; *Fremont* v. *Early*, 11 ib.

361; *Ritter* v. *Patch*, 12 Cal. 298; *Wilson* v. *Mayor of New York*, 1 Abbott, 4; *Chemical Bank* v. *same*, ib. 79; *N. Y. Life Ins. Co.* v. *same*, ib. 250.

6. Courts of equity will only interfere to enjoin a judgment at law, rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents. *Phelps* v. *Peabody*, 7 Cal. 50.

7. In an action to restrain the issuance of bonds by an incorporated company, the persons to whom those bonds are to be issued are necessary parties to such action. *Hutchinson* v. *Burr*, 12 ib. 103; *Patterson* v. *Board of Supervisors of Yuba Co.*, ib. 105.

8. An injunction cannot be granted affecting the rights and privileges of parties who have no opportunity to be heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued. *Patterson* v. *Board of Supervisors of Yuba Co.*, 12 ib. 105.

9. Where a tax deed is made *prima facie* evidence, then it would be a cloud upon the title, and an injunction would lie to restrain the selling by the officer. *Palmer* v. *Bolling*, 8 ib. 384.

10. There is no occasion that the plaintiff should first establish his title at law, before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer. *Tuolumne Water Co.* v. *Chapman*, 8 ib. 392.

11. An injunction will sometimes be allowed to prevent a multiplicity of suits. *Woodruff* v. *Fisher*, 17 Barb. 224.

12. A party who moves for a new trial and fails, cannot upon the same state of facts apply to the same judge for an injunction and re-try his case in equity. *Collins* v. *Butler*, Cal. Oct. T. 1859.

13. An injunction will be granted to prevent and restrain a nuisance at the instance of any private individual who sustains a special injury from it. *Penniman* v. *New York Balance Co.*, 13 ib. 40.

14. A party enjoined cannot stand by and see the injunction violated by a partner at their common expense and for their common benefit. It should be obeyed in letter and spirit. *Neale* v. *Osborne*, 15 How. Pr. 81.

15. An injunction may be granted to restrain proceedings on judgment, and in many cases this course is preferable to granting an order in the suit sought to be stayed. *Watt* v. *Rogers*, 2 Abbott, 261.

16. The courts of this state have no power to restrain by injunction the acts of officers of the state who are proceeding under authority of a law of the state. That such law is unconstitutional forms no ground for granting such injunction. *Thompson* v. *Commissioners of the Canal Fund*, 2 Abbott, 248.

17. An injunction should not be granted at the commencement of a suit brought to enjoin the defendant from the use of plaintiff's trade mark, and recover damages, unless the legal right of plaintiff and the violation of it by defendants, are very clear. *Merrimac Manufacturing Co.* v. *Garner*, 2 Abbott, 318.

18. 2d. The allegation, irreparable injury of itself, unless the facts are shown to the court, is insufficient. *Dewitt* v. *Hays*, 2 Cal. 463; *Merced Mining Co.* v. *Fremont*, 7 ib. 317; *Branch Turnpike Co.* v. *Supervisors Yuba Co.* Cal. April T. 1859.

19. The nuisance complained of must cause irremediable mischief, or such an injury

as cannot be compensated by damages. *Gregory* v. *Hay*, 3 Cal. 332; *Middleton* v. *Franklin*, ib. 238; *Waldron* v. *Marsh*, 5 ib. 119; *Marshall* v. *Peters*, 12 How. Pr. 218.

20. An injunction under the second division can only be for acts done or threatened, pending the litigation. *Malcolm* v. *Miller*, 6 How. Pr. 456; *Sebring* v. *Lant*, 9 ib. 347.

21. 3d. A sheriff may be enjoined from selling real property belonging to the wife, under an execution against the husband. *Alverson* v. *Jones*, 10 Cal. 9.

22. The effect of the temporary injunction under the third division is not to restrain any removal or disposition whatever of defendant's property, but only such as would defraud the creditors. *Brewster* v. *Hodges*, 1 Duer, 609.

113. The injunction may be granted at the time of issuing the summons upon the complaint; and at any time afterwards, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, shall show satisfactorily that sufficient grounds exist therefor. No injunction shall be granted on the complaint, unless it be verified by the oath of the plaintiff, or some one in his behalf, that he, the person making the oath, has read the complaint, or heard the complaint read, and knows the contents thereof, and the same is true of his own knowledge, except the matters therein stated on information and belief, and that as to those matters he believes it to be true. When granted on the complaint, a copy of the complaint and verification attached shall be served with the injunction: when granted upon affidavit, a copy of the affidavit shall be served with the injunction.

For verification, see notes to section 55.

1. The order of injunction must be served by copy. Verbal notice is insufficient, unless the party be in court and hear the order pronounced. *Elliott* v. *Osborne*, 1 Cal. 396.

2. The usual practice is to present the complaint in advance of the filing, to the judge, and obtain the order or allowance of the writ, when sought upon the complaint itself, and such practice is regular and not in conflict with the statute. *Heyman* v. *Landers*, 12 ib. 107.

3. An injunction can only be granted or sustained upon affidavit. Either the complaint must be verified, or upon complaint with an affidavit filed. *Smith* v. *Reno*, 6 How. Pr. 124; *Minor* v. *Terry*, ib. 208.

4. The original injunction order must be shown to a party. Service of a copy only, with a notice that it is a copy of the original, is not sufficient. *Watson* v. *Fuller*, 9 ib. 425.

5. The injunction may be granted on a verified complaint, if the facts are alleged positively and not on information and belief alone. *Crocker* v. *Baker*, 3 Abbott, 182; *Levy* v. *Ely*, 15 How. Pr. 395; 6 Abbott, 89.

114. An injunction shall not be allowed after the defendant has

answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge, granting or refusing the injunction.

115. On granting an injunction, the court or judge shall require, except where the people of the state are a party plaintiff, a written undertaking, on the part of the plaintiff, with sufficient sureties, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto.

See section 650.

1. An injunction order is inoperative unless the undertaking be given. *Elliott* v. *Osborne*, 1 Cal. 396.

2. The court may order a reference to ascertain the damages sustained by an injunction issued without cause. *Russell* v. *Elliott*, 2 Cal. 245; *Sullivan* v. *Judah*, 4 Paige, 444.

3. In suit on undertaking, counsel fees in having injunction dissolved, allowed. *Ah Thaie* v. *Quan Wan*, 3 Cal. 216; *Coates* v. *Coates*, 1 Duer, 664.

4. A party filing an undertaking to obtain an injunction, is deemed to have waived the right to insist on a trial by jury, and consented that the damages may be ascertained in the mode prescribed by the statute; and an order of reference is no violation of the constitutional right to trial by jury. *Russell* v. *Elliott*, 2 Cal. 245.

5. For suits on undertakings, see *Morgan* v. *Thrift*, 2 Cal. 562; *Gelston* v. *Whitesides*, 3 ib. 309; *Cunningham* v. *Breed*, 4 ib. 384.

6. An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as abuse, or without probable cause. The remedy is on the appeal bond. *Robinson* v. *Kellum*, 6 ib. 399.

7. This bond, though given to all the obligees by name, and using no word directly expressing a several obligation, yet necessarily creates a several liability, the design of it being to secure each and all of the obligees from damages or injury. *Summers* v. *Farish*, 10 ib. 347.

8. In an action against the sureties on a bond given to pay all costs and damages awarded, the complaint must set out the damages the plaintiff was awarded. *Tarpey* v. *Shillenberger*, 10 ib. 390.

9. If the protection by the security substituted should become entirely lost by reason of the insolvency of all the obligors, the right to the injunction would be restored. *Willett* v. *Stringer*, 15 How. Pr. 310.

116. If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified

time and place, why the injunction should not be granted; and the defendant may, in the mean time, be restrained.

1. The interim referred to was designed to embrace the period intervening between the date of the mandate and the hearing of the application. Although a certain day may be designated, yet the time may be continued until the court disposes of the application, and the restraining order remains in full force. *Prader* v. *Grim*, Cal. April T. 1859.

2. If the court deny the injunction, and an appeal be taken from that order, the party cannot have the restraining order continued, by giving bond or otherwise. *Hicks* v. *Michael*, Cal. Jan. T. 1860.

117. An injunction to suspend the general and ordinary business of a corporation, shall not be granted except by the court; nor shall it be granted without due notice of the application therefor to the proper officers of the corporation, except when the people of this state are a party to the proceeding.

118. If an injunction be granted without notice, the defendant, at any time before the trial, may apply upon reasonable notice, to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same. The application may be made upon the complaint and the affidavit on which the injunction was granted, or upon affidavit on the part of the defendant, with or without the answer. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to those on which the injunction was granted.

1. The court may modify the injunction on a motion *ex parte*, if it were granted *ex parte*, upon filing a bond by the defendant in the sum specified. *Fremont* v. *Merced Mining Co.*, 9 Cal. 18; *Borland* v. *Thornton*, 12 ib. 441.

2. If the answer denies the equities of the bill, the general rule is to dissolve the injunction. *Gardner* v. *Perkins*, 9 Cal. 553; *Burnett* v. *Whitesides*, Cal. April T. 1859.

3. The privilege of moving to dissolve an injunction upon answer is confined to cases where the injunction is originally granted without notice to adverse party. *Natoma Water Co.* v. *Clarkin*, Cal. October T. 1859.

4. A motion to vacate an injunction once denied, cannot be renewed unless leave be reserved or some new ground in vacating arise. *Hoffman* v. *Livingston*, 1 John. Ch. R. 211.

5. When an injunction is granted on a *verified* complaint, and defendant moves on a *verified* answer to dissolve the injunction, the plaintiff is entitled, on the motion, to read additional affidavits in support of the complaint, if the defendant by his answer

sets up new matter in avoidance. *Jaques* v. *Areson*, 4 Abbott, 282; *Powell* v. *Clark*, 5 ib. 70.

6. The plaintiff cannot read affidavits in support of the injunction if the defendant relies simply upon the answer setting up no new matter. *Blatchford* v. *New York and New Haven R. R. Co.*, 7 ib. 322.

119. If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it shall be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it shall be modified.

1. No appeal is allowed from an order refusing to dissolve an injunction; it should be from the order granting an injunction. *Martin* v. *Travers*, 7 Cal. 253. (The amendment to section 336, by the act of 1859, allows an appeal in such cases.)

2. This section is not a substitution of the power conferred by section 334, but in addition to it. *Borland* v. *Thornton*, 12 ib. 441.

CHAPTER IV.

ATTACHMENT.

120. [1853, 1858, 1860.*] *The plaintiff, at the time of issuing the summons or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as hereinafter provided in the following cases:*

1st. In an action upon a contract, expressed or implied, for the direct payment of money, which contract is made or is payable in this state, and is not secured by a mortgage, lien or pledge upon real or personal property; or if so secured, that such security has been rendered nugatory by the act of the defendant.

2d. In an action upon a contract, express or implied, against a defendant not residing in this state.

1. The remedy by attachment is not a distinct proceeding in the nature of an action in *rem*, but is auxiliary to the action at law. *Low* v. *Adams*, 6 Cal. 277.

2. These proceedings are statutory and special, and must be strictly pursued. *Roberts* v. *Landecker*, 9 ib. 262.

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* Statutes of 1860, 000.

3. If the writ of attachment issues before the summons, the former is a nullity. *Low* v. *Henry*, 9 Cal. 538.

4. A defendant whose family occupies and has been for years occupying a dwelling house in another state, hired by him, and who habitually passes each night and Sunday with his family, is a non-resident in the meaning of this section. *Chaine* v. *Wilson*, 1 Bosworth, 673; 8 Abbott, 78.

5. The word "issued" in this section should not be construed to mean the same as "delivered to the sheriff;" but any process may be issued if made out, and placed in the hands of a person authorized to serve it, and with a *bona fide* intent to have it served. *Mills* v. *Corbett*, 8 How. Pr. 500.

6. Where the defendant left New York state and went abroad to establish business, but intended, even if successful, to leave it in charge of a clerk and return: held, that he was not a non-resident. *Hurlbut* v. *Seeley*, 11 How. Pr. 507; 2 Abbott, 138; *Greaton* v. *Morgan*, 8 ib. 64; *Chaine* v. *Wilson*, ib. 78.

7. Where a party has been attached as a non-resident, he may move to discharge the attachment on the ground of his being a resident, and the court will grant a reference to ascertain the fact without an undertaking from defendant. *Killian* v. *Washington*, 2 Code R. 78.

8. A threat by a debtor that he would assign and put his property out of his hands, made in words which may be construed to mean, that he would make a lawful assignment, is not, without any evidence of contemporaneous or subsequent acts, showing a fraudulent intent, a sufficient ground for an attachment. *Wilson* v. *Britton*, 6 Abbott, 97. (Applying to repealed amendment of 1858.)

121. [1853, 1858, 1860.*] *The clerk of the court shall issue the writ of attachment upon receiving an affidavit by, or on behalf of the plaintiff, which shall be filed, showing:*

1st. That the defendant is indebted to the plaintiff, specifying the amount of such indebtedness over and above all legal set-offs or counter claims, upon a contract express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage, lien or pledge upon real or personal property; or,

2d. That the defendant is indebted to the plaintiff, (specifying the amount of such indebtedness, as near as may be, over and above all legal set-offs or counter claims) and that the defendant is a non-resident of the state; and,

3d. That the sum for which the attachment is asked, is an actual bona fide, existing debt, due and owing from the defendant to plaintiff,

* Statutes of 1860, 000.

and that the attachment is not sought, and the action is not prosecuted to hinder, delay, or defraud any creditor or creditors of the defendant.

1. An order improperly refusing an attachment will be reversed, even after final judgment. *Griswold* v. *Sharp*, 2 Cal. 17.

2. An order improperly dissolving an attachment will be reversed. *Reiss* v. *Brady* 2 ib. 132.

3. An objection can be urged on appeal against the order of the district court refusing to discharge the attachment, after final judgment was had against defendants. *Taaffe* v. *Rosenthall*, 7 ib. 514.

4. An appeal will not lie from an order refusing to discharge an attachment. *Baker* v. *Rosenthall*, 7 ib. 514.

5. A notice of motion to discharge a writ of attachment "because the said writ was improperly issued" is insufficient. The notice should specify the grounds of the motion. *Freeborn* v. *Glazer*, 10 ib. 337.

6. The proceedings in discharging a writ of attachment fully discussed. *New York and Erie Bank* v. *Codd*, 11 How. Pr. 221.

7. On motion to vacate an attachment, the plaintiff's affidavits in opposition are to be received only for the purpose of explaining or contradicting the moving affidavits, and unless the attachment can be sustained on the original affidavits, it should be discharged. He should not be allowed to supply a deficiency in his first affidavits. *Wilson* v. *Britton*, 6 Abbott, 33.

8. It seems that the affidavit must state the facts and circumstances; the words of the statute, unaided by any other fact or substantiation, are not sufficient as legal evidence. *Furman* v. *Walter*, 13 How. Pr. 349.

9. An attachment is only given in cases of indebtedness arising out of a contract. *Griswold* v. *Sharp*, 2 Cal. 17.

10. The contract must be made in this state, or must contain a stipulation that the money is to be paid here, to authorize an attachment. *Dulton* v. *Shelton*, 3 ib. 206.

11. The affidavit must state whether the contract is express or implied, and not state it in the alternative. *Hawley* v. *Delmas*, 4 ib. 195.

12. The assignment of a note as collateral security, is not a mortgage, but a mere pledge of the note, yet its holder cannot attach; the words "mortgage upon personal property," includes pledge. *Payne* v. *Bensley*, 8 ib. 260.

13. The sureties are estopped from controverting that the defendant was not a non-resident. *Haggart* v. *Morgan*, 1 Seld. 422.

14. What constitutes a non-resident within the meaning of the law relating to attachments. *Hurlburt* v. *Seeley*, 11 How. Pr. 507; 2 Abbott, 138.

15. The affidavit is insufficient if neither plaintiff nor defendant is individually named therein. *Burgess* v. *Stitt*, 12 How. Pr. 401.

122. [1858, 1860.*] *Before issuing the writ, the clerk shall*

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* Statutes of 1860, 000.

require a written undertaking on the part of the plaintiff, in a sum not less than two hundred dollars, not exceeding the amount claimed by the plaintiff, with sufficient sureties to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

See sections 140, 650.

1. For suit on attachment bond, see *Heath* v. *Lent*, 1 Cal. 410; *Benedict* v. *Bray*, 2 ib. 251, and *Ah Thaie* v. *Quan Wan*, 3 ib. 216, overruling part of *Heath* v. *Lent*.

2. The undertaking must precede the writ and accompany the affidavit. *Benedict* v. *Bray*, 2 ib. 251.

3. The undertaking is not required to be executed in form to the defendant; the law only specifies the conditions it shall contain. *Taaffe* v. *Rosenthall*, 7 ib. 514.

4. An attachment issued without an undertaking of a plaintiff and a surety would be irregular, and perhaps void. *Bennett* v. *Brown*, 1 Code R., N. S., 267.

123. [1860.*] The writ shall be directed to the sheriff of any county in which property of such defendant may be, and require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs; *or in an amount equal to the value of the property which has been or is about to be attached; in which case to take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties.*

See section 650.

1. Funds in the hands of a receiver appointed by a competent court, are not liable to attachment. *Adams* v. *Haskell*, 6 Cal. 113; *Yuba County* v. *Adams*, 7 ib. 35.

2. For suit against a sheriff for not attaching, see *Strong* v. *Patterson*, 6 ib. 156.

3. The bond only operates to release the property from the custody of the sheriff, pending the suit, and is not an actual substitution of security. *Low* v. *Adams*, 6 ib. 277.

4. Where a defendant, as sheriff, collects money on attachment, more than sufficient to satisfy the attaching creditor, and after the expiration of his term of office another attaching creditor attaches the surplus and seeks to make the ex-sheriff liable therefor on his official bond, it was held, that the demurrer to the complaint was properly sus-

* Statutes of 1860, 000.

tained, as there was no relation between the defendant and plaintiff to render defendant officially liable. The defendant could only be garnisheed as a private individual. *Graham* v. *Endicott*, 7 Cal. 144.

5. Attaching and judgment creditors prior to the decree of dissolution of partnership effects are entitled to the fruits of their judgments, and must be paid. *Adams* v. *Hackett*, ib. 187; *Adams* v. *Woods*, 8 ib. 306; 9 ib. 24.

6. In an action on this undertaking, the complaint should allege that the property attached was released upon the delivery of the undertaking. *Williamson* v. *Blattan*, ib. 500.

7. Upon the execution and delivery of a bond for the release of property attached, though not made in conformity to the requirements of the statute, yet a recovery thereupon may be had. The statute, in prescribing one form of action, does not prohibit others; and a bond voluntarily given upon the delivery of the property is valid at common law. *Palmer* v. *Melvin*, Cal. Ap. T. 1859.

8. Copartnership property cannot be seized on an attachment against one absconding partner for a partnership debt. *Stoutenburg* v. *Vandenburgh*, 7 How. Pr. 229; *Sears* v. *Gearn*, ib. 383; contra *Brewster* v. *Honigsberger*, 2 Code R. 50.

9. When a sheriff to whom an attachment was issued neglected to levy on sufficient property to satisfy the debt, he was held liable in an action against him for the deficiency, it appearing that the defendant in the attachment had sufficient property to satisfy the demand, and that the sheriff knew it at the time of the levy. *Ransom* v. *Halcott*, 9 How. Pr. 119.

10. If, after giving the undertaking, the sureties become insolvent, the court has no power to require the defendant to procure additional sureties. *Dudley* v. *Goodrich*, 7 Abbott, 26.

11. In an action on this undertaking it is not necessary to allege in the complaint that the attachment was duly issued, nor to show that the officer or court had jurisdiction to issue it, if it be shown that the action in which it was issued was brought and pending in a court of general jurisdiction. *Cruyt* v. *Phillips*, ib. 205.

124. The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, and all debts due such defendant, and all other property in this state of such defendant not exempt from execution, may be attached, and if judgment be recovered, be sold to satisfy the judgment and execution.

125. The sheriff to whom the writ is directed and delivered shall execute the same without delay, and if the undertaking mentioned in section one hundred and twenty-three be not given, as follows:

1st. Real property shall be attached by leaving a copy of the writ with the occupant thereof; or if there be no occupant, by posting a

copy in a conspicuous place thereon, and filing a copy, together with a description of the property attached, with the recorder of the county.

2d. Personal property, capable of manual delivery, shall be attached by taking it into custody.

3d. Stock or shares, or interest in stock or shares, of any corporation or company, shall be attached by leaving with the president, or other head of the same, or the secretary, cashier or managing agent thereof, a copy of the writ, and a notice stating the stock or interest of the defendant is attached in pursuance of such writ.

4th. Debts and credits, and other personal property, not capable of manual delivery, shall be attached by leaving with the person owing such debts, or having in his possession, or under his control, such credits, or other personal property, a copy of the writ, and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control, belonging to the defendant, are attached in pursuance of such writ.

1. Property in the custody of the law is not liable to seizure, without an order from the court having charge thereof. *County of Yuba* v. *Adams*, 7 Cal. 35.

2. In a contest between the attaching creditors, all the equities are in favor of the most diligent, and an irregularity cannot be taken advantage of by a stranger, to the action in which it occurs. *Dixey* v. *Pollock*, 8 ib. 570.

3. The application of an attaching creditor, to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given, by the party moving, to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. Ib.

4. A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands, except in due course of law; and if he does, and the debt is lost, he is responsible to the plaintiff in attachment for the amount of his debt. The statute requires the directions to be in writing, and parol directions will not discharge the liability. *Sandford* v. *Boring*, 12 Cal. 539.

5. The lien of an attaching creditor of real estate takes effect immediately upon the levy of the attachment, and the deposit of a copy of the writ, together with a description of the land attached, with the county recorder. Such lien cannot be divested by the failure of the sheriff to make a proper return of the writ. Nor is it necessary, where the levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied. Our statute prescribes the manner in which real estate may be attached, but contains no express provision requiring that all the acts necessary to a valid levy shall be set out in the return; nor can such a rule be sustained. The deposit in the recorder's office of a copy of the writ, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. *Ritter* v. *Scannell*, 11 ib. 238.

6. The sheriff must in all cases execute the writ with all reasonable celerity, but is not held to the duty of starting on the instant after receiving the writ to execute it, without regard to anything else than its instant execution. Reasonable diligence is all that is required of him in such instances, depending upon the particular facts in connection with the subject. *Whitney* v. *Butterfield*, Cal. Ap. T. 1859.

7. The levy, to be lawful, must be made by taking the goods into custody, and the officer must be in a condition to supervise them. *Taffts* v. *Manlove*, Cal. July T. 1859.

8. The attachment of money due in the hands of a banker or third person, where the coin is not separated and identified, is only a garnishment, and does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. *Walling* v. *Miller*, Cal. Jan. T. 1860.

9. The sheriff must retain the property in his possession until the determination of the action; and if the plaintiff prevail, until it is sold under execution, unless the judgment is satisfied, or the property sold as perishable. He should not turn the property over to his successor in office. *McKay* v. *Harrower*, 27 Barb. 463.

10. Real property may be attached without possession; personal property cannot be. *Learned* v. *Vandenburgh*, 7 How. Pr. 379.

11. Letters and correspondence cannot be attached. *Herryman* v. *Dettleback*, 11 ib. 47.

12. 3d. See notes to section 29, as to service.

13. Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor and attachment on his interest in the corporation. *Edwards* v. *Bougnot*, 7 Cal. 162.

14. Bonds made by a railroad company, and placed in the hands of their agents to be sold, are not, either in the hands of the company or of the agents, the property of the company, in such sense that an attachment issued against the company can be levied upon them. *Coddington* v. *Gilbert*, 2 Abbott, 242.

126. Upon receiving information in writing from the plaintiff, or his attorney, that any person has in his possession, or under his control, any credits or other personal property belonging to the defendant, or is owing any debt to the defendant, the sheriff shall serve upon such person a copy of the writ, and a notice that such credits, or other property or debts, as the case may be, are attached in pursuance of such writ.

127. All persons having in their possession, or under their control, any credits or other personal property belonging to the defendant, or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice, as provided in the last two sections, shall be, unless such property be delivered up or transferred, or such debts be paid to the sheriff, liable to the plaintiff, for the amount of

such credits, property or debts, until the attachment be discharged, or any judgment recovered by him be satisfied.

1. In proceedings against a garnishee, it is the duty of the court simply to render judgment against the garnishee for the amount due by him to the judgment debtor. To order the money paid over is error. *Smith* v. *Brown*, 5 Cal. 118; *Brumagim* v. *Boucher*, 6 ib. 16.

128. [1855.*] Any person owing debts to the defendant, or having in his possession or under his control, any credits or other personal property belonging to the defendant, may be required to attend before the court or judge, or a referee appointed by the court or judge, and be examined on oath respecting the same. The defendant may also be required to attend for the purpose of giving information respecting his property, and may be examined on oath. The court or judge may, after such examination, order personal property capable of manual delivery to be delivered to the sheriff on such terms as may be just, having reference to any liens thereon, or claims against the same, and a memorandum to be given of all other personal property, containing the amount and description thereof.

1. A garnishee can only be required to answer as to his liability to defendant at the time of the service of garnishment. *Johnson* v. *Carry*, 2 Cal. 33; *Norris* v. *Burgoyne*, 4 ib. 409.

2. Where a garnishee answers under oath that he was released by the plaintiff, who abandoned the examination, he should be discharged, unless such answer under oath be denied by plaintiff. Where a party is garnisheed to answer on a certain day, and appears, and the summoning party declines, or is not prepared to take his answer, and a term elapses, the party is discharged from liability to answer. *Ogden* v. *Mills*, 3 ib. 253.

3. Unless the answer of the garnishee discloses liens having priority of claim upon the funds in his hands, an order for a bill of interpleader will not be granted. *Cahoon* v. *Levy*, 4 ib. 243.

4. To subserve the purposes of justice, courts should allow a garnishee to amend his answer, whenever it appears that he hascommitted a mistake or fallen into an error which could not reasonably have been avoided, but not otherwise. *Smith* v. *Brown*, 5 ib. 118,

5. Upon suit on a garnishment, the garnishee is entitled to a trial by jury. *Cahoon* v. *Levy*, 5 ib. 294.

6. The provisions of this section are intended to secure the property after the lien

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* Statutes of 1855, 196.

has attached. If, however, this object is already secured, the court from which the attachment issues will not proceed any further. *Adams* v. *Haskell*, 9 Cal. 24.

7. This provision was intended to secure the plaintiff and not to confer a privilege on the garnishee, and the plaintiff may or may not at his election, require the garnishee to appear and answer, and his liability will not be affected by the failure of the plaintiff to take such a step. *Roberts* v. *Landecker*, 9 ib. 262.

129. The sheriff shall make a full inventory of the property attached, and return the same with the writ. To enable him to make such return as to debts and credits attached, he shall request, at the time of service, the party owing the debt, or having the credit, to give him a memorandum, stating the amount and description of each; and if such memorandum be refused, he shall return the fact of refusal with the writ. The party refusing to give the memorandum may be required to pay the costs of any proceedings taken for the purpose of obtaining information respecting the amount and description of such debt or credit.

1. If the party furnishes to the sheriff a certificate that he has no property, he cannot be examined until the truth of the certificate be impeached. This provision only applies to those who refuse to give a certificate. *Carroll* v. *Finley*, 26 Barb. 61.

130. If any of the property attached be perishable, the sheriff shall sell the same in the manner in which such property is sold on execution. The proceeds, and other property attached by him, shall be retained by him to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment. Debts and credits attached may be collected by him, if the same can be done without suit. The sheriff's receipt shall be a sufficient discharge for the amount paid.

See section 654.

1. No order of court is required to authorize this sale by the officer. *Low* v. *Henry*, 9 Cal. 538.

131. If any personal property attached be claimed by a third person, as his property, the sheriff may summon a jury of six men to try the validity of such claim; and such proceedings shall be had thereon, with the like effect, as in a case of a claim after levy upon execution.

See section 218.

1. In a suit against the sheriff for not levying the attachment, if the sheriff prove a

trial by jury, and verdict for claimant, the plaintiff must show that he tendered the bond of indemnity to the sheriff, required by law. *Strong* v. *Patterson*, 6 Cal. 156.

2. The sheriff may lawfully require a bond of indemnity before executing an attachment upon goods not in the possession of a debtor, but of a third person claiming them as his own. *Chamberlain* v. *Beller*, 18 N. Y. 115.

132. If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him which has not been delivered to the defendant, or a claimant as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

1st. By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or [of] any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

2d. If any balance remain due, and an execution shall have been issued on the judgment, he shall sell under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales shall be given, and the sales conducted as in other cases of sales on execution.

1. Where an attachment was issued by the court against property of the debtor, and the sheriff had executed the same and was ordered to make the amount due the creditor out of the goods, chattels and property of the debtor, the sheriff could not maintain an action in his own name to recover a sum owing to the attachment debtor by a third person, for goods sold and delivered. *Sublette* v. *Melhado*, 1 Cal. 104.

133. If after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, any balance shall remain due, the sheriff shall proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment.

134. If the execution be returned unsatisfied in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section one hundred and twenty-three, or section one hundred and thirty-

seven, or he may proceed as in other cases upon the return of an execution.

1. The undertaking only operated to release the property from the custody of the sheriff pending the suit, and not as an actual substitution of security. *Low* v. *Adams*, 6 Cal. 277.

135. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all the proceeds of sales and money collected by the sheriff, and all the property attached, remaining in the sheriff's hands, shall be delivered to the defendant or his agent; the order of attachment shall be discharged, and the property released therefrom.

136. [1854.*] Whenever the defendant shall have appeared in the action, he may apply, upon reasonable notice to the plaintiff, to the court in which the action is pending, or to the judge thereof, or to a county judge, for an order to discharge the same, upon the execution of the undertaking mentioned in the next section; and if the application be granted, all the proceeds of sales and moneys collected by the sheriff, and all the property attached remaining in his hands, shall be released from the attachment, and delivered to the defendant, upon the justification of the sureties on the undertaking, if required by the plaintiff.

1. In a complaint upon this bond it must be alleged that the property attached was released upon the execution of the bond. *Palmer* v. *Melvin*, 6 Cal. 651; *Williamson* v. *Blatton*, 9 ib. 500.

137. [1854.*] Upon such application, the defendant shall deliver to the court or judge, an undertaking executed by at least two sureties, residents and freeholders or householders in the county, to the effect that the sureties will, on demand, pay to the plaintiff the amount of any judgment that may be recovered in favor of the plaintiff in the action, not exceeding the sum specified in the undertaking, which shall be sufficient to satisfy the amount claimed by the plaintiff in his complaint, and the costs. The sureties may be required to justify, on such application before the judge or court, and the property attached shall

* Statutes of 1854, 84.

not be released from the attachment without their justification, if the same be required.

138. [1854, 1858, 1860.*] *The defendant may also, any time before the time for answering expires, apply, on motion, upon reasonable notice to the plaintiff, to the court in which the action is brought, or to the judge thereof, or to a county judge, that the attachment be discharged, on the ground that the writ was improperly issued.*

1. An order improperly refusing an attachment will be reversed, even after final judgment. *Griswold* v. *Sharp*, 2 Cal. 17.

2. An order improperly dissolving an attachment will be reversed. *Reiss* v. *Brady*, 2 ib. 132.

3. An objection can be urged on appeal against the order of the district court refusing to discharge the attachment, after final judgment was had against defendants. *Taaffe* v. *Rosenthall*, 7 ib. 514.

4. An appeal will not lie from an order refusing to discharge an attachment. *Baker* v. *Rosenthall*, 7 ib. 514.

5. A notice of motion to discharge a writ of attachment "because the said writ was improperly issued" is insufficient. The notice should specify the grounds of the motion. *Freeborn* v. *Glazer*, 10 ib. 337.

6. The proceedings in discharging a writ of attachment fully discussed. *New York and Erie Bank* v. *Codd*, 11 How. Pr. 221.

7. On motion to vacate an attachment, the plaintiff's affidavits in opposition are to be received only for the purpose of explaining or contradicting the moving affidavits, and unless the attachment can be sustained on the original affidavits, it should be discharged. He should not be allowed to supply a deficiency in his first affidavits. *Wilson* v. *Britton*, 6 Abbott, 33.

8. It seems that the affidavit must state the facts and circumstances; the words of the statute, unaided by any other fact or substantiation, are not sufficient as legal evidence. *Furman* v. *Walter*, 13 How. Pr. 349.

139. [1858, 1860.*] *If the motion be made upon affidavits, on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other evidence, in addition to those on which the order of attachment was made.*

140. [1858, 1860.*] *If, upon such application, it shall satisfactorily appear that the writ of attachment was improperly issued, it shall be discharged.*

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* Statutes of 1860, 000.

141. The sheriff shall return the writ of attachment with the summons, if issued at the same time; otherwise, within twenty days after its receipt, with a certificate of his proceedings endorsed thereon, or attached thereto. The provisions of this chapter shall not apply to any suits already commenced, but so far as such suits may be concerned, the act entitled "An Act to regulate proceedings against debtors by attachment," passed April 22d, 1850, shall be deemed in full force and effect.

1. The sheriff's return is conclusive against the plaintiff, and his action must be for a false return. *Egery* v. *Buchanan*, 5 Cal. 53.

2. This return cannot be amended where a third party has acquired an interest adverse to the attachment. *Newhall* v. *Provost*, 6 ib. 85; *Webster* v. *Haworth*, 8 ib. 21.

3. A mistake in the date of the sheriff's return may be amended at any time. *Ritter* v. *Scannell*, 11 ib. 238.

4. It is the duty of a sheriff to return process to the proper office, and if sent by mail, he must pay the postage on the letter containing it. *Jenkins* v. *McGill*, 4 How. Pr. 205.

5. It is not necessary, and in many cases would be unjust, to drive the defendant to an action for a false return for redress. *Van Rensselaer* v. *Chadwick*, 7 ib. 297.

CHAPTER V.

DEPOSIT IN COURT.

142. When it is admitted, by the pleading or examination of a party, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs, or is due, to another party, the court may order the same, upon motion, to be deposited in court, or delivered to such party, upon such conditions as may be just, subject to the further direction of the court.

1. An order directing the defendant to pay the amount admitted due by the answer is an appealable order. *Merritt* v. *Thompson*, 1 Abbott, 223.

143. [1854.*] A receiver may be appointed by the court in which the action is pending, or by a judge thereof:

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* Statutes of 1854, 84.

1st. Before judgment, provisionally, on the application of either party, when he establishes a prima facie right to the property, or to an interest in the property which is the subject of the action, and which is in possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired;

2d. After judgment, to dispose of the property according to the judgment, or to preserve it during the pending of an appeal; and

3d. In such other cases as are in accordance with the practice of courts of equity jurisdiction.

1. The appointment of a receiver in an action for the dissolution of a partnership, and the distribution of its effects in chancery, sustained. *Adams* v. *Haskell*, 6 Cal. 113; *Groschen* v. *Page*, ib. 138.

2. The receiver should be allowed all necessary disbursements, although the proceedings were void ab initio. *Adams* v. *Haskell*, 6 ib. 475.

3. The receiver should not employ counsel who are acting for one of the parties in the original suit. Ib.; *Adams* v. *Woods*, 8 ib. 306.

4. A receiver having the right to stipulate with the counsel employed by him, that the counsel shall rely upon the allowance made by the court for his services, it is the duty of the receiver to report, among his disbursements, the claim of the counsel, leaving the amount to be fixed by the court; and if the counsel, or any other person employed by the receiver, feels aggrieved by the order of the court thereon, he can appeal therefrom. *Adams* v. *Woods*, ib. 306.

5. Funds in the hands of a receiver in a suit for dissolution, are subject to attachment at any time before a final decree of dissolution and distribution. *Adams* v. *Woods*, 9 ib. 24.

6. A county judge, though he has authority to grant or refuse an injunction, has no authority to appoint a receiver. *Ruthrauff* v. *Kresz*, Cal. July T. 1859.

7. Upon a motion for the receiver, the merits are not inquired into. It relates only to the preservation of the property in controversy. *Chapman* v. *Hammersley*, 4 Wend. 173.

8. A receiver should apply for an order for leave to sue for a debt. *Merritt* v. *Lyon*, 16 Wend. 410; *Smith* v. *Woodruff*, 6 Abbott, 65.

9. A receiver who has obtained authority from the court to sue, is not only authorized but bound to proceed with his action, and he is not to be restrained by injunction out of another court, or by making him a party to a new action, and obtaining an injunction against him. *Winfield* v. *Bacon*, 24 Barb. 155.

10. An order to show cause why a receiver should be appointed before the action is commenced, is irregular. *Kattenstroth* v. *The Astor Bank*, 2 Duer, 632.

11. The principle upon which a receiver of partnership property is appointed, is with the view of winding up the concern, and dividing the surplus, and not for the purpose of carrying on the partnership business. *Jackson* v. *DeForest*, 14 How. Pr. 81.

12. A special receiver appointed in a cause to take charge of the fund in dispute, is an officer of the court, and entitled to the instructions of the court as to his duty under an order in the cause respecting payment out of such fund. *Curtis* v. *Leavitt*, 1 Abbott, 274.

TITLE VI.

OF THE TRIAL AND JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.

JUDGMENT IN GENERAL.

144. A judgment is the final determination of the rights of the parties in the action or proceeding, and may be entered in term or vacation.

1. By a final judgment is to be understood, not a final determination of the rights of the parties in the subject matter of the litigation, but merely of the particular suit. *Belt* v. *Davis*, 1 Cal. 134.

2. A judgment rendered by a district court, after the time appointed by law for its adjournment, is invalid, and will be reversed on appeal. *Smith* v. *Chichester*, 1 Cal. 409; *Coffinberry* v. *Horrill*, 5 Cal. 493; *Peabody* v. *Phelps*, 7 Cal. 53; *Wicks* v. *Ludwig*, 9 Cal. 173; *Shaw* v. *McGregor*, 8 Cal. 521.

3. After the adjournment of term, the court cannot disturb its judgment except in cases prescribed by statute. *Baldwin* v. *Kramer*, 2 Cal. 582; *Morrison* v. *Dapman*, 3 Cal. 255; *Suydam* v. *Pitcher*, 4 Cal. 280; *Carpentier* v. *Hart*, 5 Cal. 406; *Robb* v. *Robb*, 6 Cal. 21; *Shaw* v. *McGregor*, 8 Cal. 521.

4. A judgment rendered without jurisdiction can be attacked directly or collaterally; but if rendered upon irregular process, it can be attacked only by a direct proceeding against the judgment, in the court which rendered it, or on appeal. *Whitwell* v. *Barbier*, 7 Cal. 54; *Dorente* v. *Sullivan*, ib. 279; *Alderson* v. *Bell*, 9 Cal. 315.

5. The judgment of a court of competent jurisdiction directly upon the point is, as a plea, a bar, and as evidence conclusive between the same parties upon the same matter directly in another court. *Love* v. *Waltz*, 7 Cal. 250.

6. If an entire judgment be composed of several elements, and one or more of them is illegal, the whole judgment is void as against creditors. *Taaffe* v. *Josephson*, 7 Cal. 352.

7. If a judgment is pronounced by a court having jurisdiction, no matter how irregular it may be, it must stand until set aside or reversed on appeal. But when entered by a mere ministerial officer, without authority of law, it is wholly void. *Stearns* v. *Aguirre*, 7 Cal. 443.

8. An order is the judgment of the court upon any motion or proceeding, and includes cases where affirmative relief is granted, or relief denied. *Gilman* v. *Contra Costa Co.* 8 Cal. 52.

9. A judgment, void for want of personal jurisdiction, is not cured by the appearance of the party for the purpose of vacating it. The court must have jurisdiction of the subject matter, and of the person. *Gray* v. *Hawes*, 8 Cal. 562.

10. No trial can be had or judgment entered by the court except in term time. *Wicks* v. *Ludwig*, 9 Cal. 173.

11. Where a demurrer was interposed and sustained, and during the same term judgment was rendered in favor of plaintiff, the appellate court will not presume that the order sustaining the demurrer was set aside by the court before judgment was entered. *Seaver* v. *Cay*, 9 Cal. 564.

12. All intendments must be in favor of sustaining the judgment of the courts of original jurisdiction; and to disturb such judgment it is not sufficient that error may have intervened, but it must be affirmatively shown by the record. *Nelson* v. *Lemmon*, 10 Cal. 49.

13. If a party, by antedating a promissory note, and making it draw interest from date, secures to himself in his judgment a certain sum of money as interest not justly due to him, the judgment is void. *McKenty* v. *Gladwin*, 10 Cal. 227.

14. If an action is brought upon a claim not yet due, and the defendant tacitly consents to judgment, a third person cannot question its validity upon that ground, as a fraud in law. It operates as a confession of judgment for an amount to grow due. *Patrick* v. *De Monteder*, Cal. Ap. T. 1859.

15. An action will lie on a judgment or decree obtained in one of the district courts of this state. *Ames* v. *Hoy*, 12 Cal. 10.

16. A judgment is property which may be purchased like any other property, and the assignee is the holder of an equity subject to all defenses which previously existed. *Wright* v. *Levy*, 12 Cal. 257.

17. A judgment will not be set aside as fraudulent, on the ground that it is taken for more than was actully due upon the note, when the mistake appears of a few dollars only in calculating the interest on the note. *Ziel* v. *Dukes*, 12 Cal. 479.

18. A motion in arrest of judgment may be made under the code. *Noxon* v. *Bently*, 7 How. Pr. 316.

145. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

1. Judgment rendered in favor of plaintiff against one defendant, and in favor of the other defendant against plaintiff. *Rowe* v. *Chandler*, 1 Cal. 167: *Adams* v. *Gorham*, 6 Cal. 68; *Claflin* v. *Butterfly*, 5 Duer, 327; 2 Abbott, 446.

2. A judgment which is right will not be reversed because it is rendered upon a wrong reason. *Helm* v. *Dumars*, 3 Cal. 454.

3. A general judgment against all defendants, where only one was served with process, is error. *Estell* v. *Chenery*, 3 Cal. 467.

4. It appearing upon the trial of an action brought against seven defendants, that five of them only were liable, the plaintiff moved to strike out the names of the other two. Motion granted, with the condition that he pay their costs: and judgment rendered in favor of the two for their costs, and against the five for the debt and costs. The allowance of costs to the two defendants severed, sustained on appeal. The proper form of judgment in such a case. *Marks* v. *Bard*, 1 Abbott, 63.

146. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

1. It must appear to the court that a several judgment would be proper. *Stearns* v. *Aguirre*, 6 Cal. 176.

2. In an action against defendants jointly indebted, where one only is served, a several judgment may be entered against him. *Hirschfield* v. *Franklin*, 6 Cal. 607.

147. The relief granted to the plaintiff, if there be no answer, shall not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.

148. An action may be dismissed, or a judgment of non-suit entered in the following cases:

1st. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counter claim has not been made. If a provisional remedy has been allowed, the undertaking shall thereupon be delivered by the clerk to the defendant, who may have his action thereon.

2d. By either party, upon the written consent of the other.

3d. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

4th. By the court, when upon the trial, and before the final submission of the case, the plaintiff abandons it.

5th. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. The dismissal mentioned in the first two subdivisions, shall be made by an entry in the clerk's register. Judgment may thereupon be entered accordingly.

1. Where a motion is made for a non-suit without stating the grounds upon which it is made, it is not error to overrule the motion. *Kiler* v. *Kimbal*, 10 Cal. 267; *McGarrity* v. *Byington*, 12 Cal. 426.

2. 1st. An appeal does not lie in favor of plaintiff, from a judgment of non-suit entered on his own motion. *Imley* v. *Beard*, 6 Cal. 666.

3. By "trial" is meant the determination or finding in the case, and plaintiff may take a non-suit after the defendant has closed his testimony. Nor is he bound to tender the costs until they are known and computed. The effect of a non-suit is to subject him to costs. *Hancock Ditch Co.* v. *Bradford*, Cal. July T. 1859.

4. Though a non-suit may be entered by consent, yet if the plaintiff reserves the right to move to set the same aside, he conserves all his right. *Natoma Water Co.* v. *Clarkin*, Cal. Oct. T. 1859.

5. After a set-off is pleaded and admitted, plaintiff cannot discontinue as a matter of course. *Cockle* v. *Underwood*, 3 Duer, 676; 1 Abbott, 1; contra, *Reese* v. *Van Patten*, 13 How. Pr. 258.

6. If not admitted, the plaintiff may discontinue. *Seabord and Roanoke R. R. Co.* v. *Ward*, 1 Abbott, 46; *Oaksmith* v. *Sutherland*, 4 ib. 15.

7. 3d. Where a bill disclosed that the same subject matter had been litigated between the same parties in a prior suit, and that in the said suit, the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed. *Barnett* v. *Kilbourne*, 3 Cal. 327.

8. One of several defendants who have not been served with a summons or complaint, cannot voluntarily appear and move to dismiss the complaint, where his rights are not affected. He must wait to be summoned. *Tracy* v. *Reynolds*, 7 How. Pr. 327.

9. A dismissal of complaint for want of appearance, is a judgment in the action in favor of the defendant. *Tillspaugh* v. *Dick*, 8 ib. 33.

10. 5th. Where the defendant moved for a non-suit, and afterwards introduced evidence supplying the defect in the plaintiff's testimony, on which the motion for non-suit was founded: held, that the defendant had thereby waived his motion, and could not insist upon it in the appellate court. *Ringgold* v. *Haven*, 1 Cal. 108; *Smith* v. *Compton*, 6 Cal. 24; *Winans* v. *Hardenbergh*, 8 Cal. 291; *Perkins* v. *Thornburgh*, 10 ib. 189.

11. Plaintiff may be non-suited against his consent. Where there is no evidence to warrant a verdict, it is the duty of the court to enter a non-suit. *Ringgold* v. *Haven*, 1 Cal. 108; *Dalrymple* v. *Hanson*, ib. 125; *Mateer* v. *Brown*, ib. 221; *Peralta* v. *Mariea*, 3 Cal. 185.

12. Where a party moves for a non-suit upon a specific ground, he cannot, on appeal, assume a different position. *Ledley* v. *Hayes*, 1 Cal. 160; *Mateer* v. *Brown*, 1 Cal. 221.

13. If no objection be made to the introduction of promissory notes in evidence, whose endorsements are not denied with sufficient certainty in the answer, a non-suit cannot be granted on that ground. *Pinkham* v. *McFarland*, 5 Cal. 137.

14. Under like circumstances, the court may allow evidence to be introduced. *Priest* v. *Union Canal Co.*, 6 Cal. 170.

15. After a motion for a non-suit, the court may allow an amendment of the com-

plaint, if it will not operate as a surprise upon the defendants. *Farmer* v. *Cram*, 7 Cal. 135.

16. It is error to refuse in an action of ejectment a non-suit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner* v. *Marshall*, 9 Cal. 268.

17. The court at the trial may remedy by amendment, a variance between the case made by the proof and the complaint, where all the facts essential to the rights of the parties are put in issue by the answer and reply. *Hall* v. *Gould*, 3 Kern, 127.

149. In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits.

CHAPTER II.

JUDGMENT UPON FAILURE TO ANSWER.

150. Judgment may be had, if the defendant fail to answer the complaint, as follows:

1st. In an action arising upon contract for the recovery of money or damages only, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk, upon the application of the plaintiff, shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant, or against one or more of several defendants in the cases provided for in section thirty-two.

2d. In other actions, if no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, the clerk shall enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. If the taking of any account, or the proof of any fact, be necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof; or may, in its discretion, order a reference for that purpose. And where the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury: or, if to determine the amount

of damages, the examination of a long account be necessary, by a reference as above provided.

3d. In actions where the service of the summons was by publication, the plaintiff, upon the expiration of the time designated in the order of publication, may, upon proof of the publication, and that no answer has been filed, apply for judgment; and the court shall thereupon require proof to be made of the demand mentioned in the complaint; and if the defendant be not a resident of the state, shall require the plaintiff or his agent to be examined on oath, respecting any payments that have been made to the plaintiff, or to any one for his use, on account of such demand, and may render judgment for the amount which he is entitled to recover.

1. There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings, and trial by a jury, and the error may be corrected on appeal. *Stevens* v. *Ross*, 1 Cal. 94.

2. If the summons be radically defective, it will not support a judgment by default. *The State* v. *Woodlief*, 2 Cal. 241; *Pico* v. *Carillo*, 7 Cal. 30.

3. Judgment by default will be set aside for surprise. *Bidleman* v. *Kewen*, 2 Cal. 248.

4. A final judgment by default can properly be rendered upon an unliquidated demand, when the defendant has been notified in the summons of the amount for which the plaintiff will take judgment. *Hartman* v. *Williams*, 4 Cal. 254.

5. A judgment by default will be reversed where the record shows that the defendant has not been legally served with process. *Joyce* v. *Joyce*, 5 Cal. 449.

6. Where a summons has been served, a judgment by default amounts to a confession on the part of the defendants of all the material facts in the complaint. *Harlan* v. *Smith*, 6 Cal. 173; *Rowe* v. *Table Mountain Water Co.*, 10 Cal. 441; *McGregor* v. *Shaw*, 11 ib. 47.

7. A judgment by default, where summons has been served on defendant, cannot be attacked collaterally for a mere irregularity of service, or for a defective return. The defendant should assert his rights by appeal from the judgment. *Dorente* v. *Sullivan*, 7 Cal. 279.

8. A judgment by default may as well be taken against an administrator as any other party. *Chase* v. *Swain*, 9 Cal. 130.

9. A default admits only the facts alleged in the complaint, and may cure a defective allegation, but not the entire absence of any allegation whatsoever. *Hentsch* v. *Porter*, 10 Cal. 555.

10. In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill. *Raun* v. *Reynolds*, 11 Cal. 14.

11. A default on a complaint containing special counts, defectively stated, and also the common counts in *assumpsit*, properly stated, will support a judgment; the default being a confession of the indebtedness for the causes and on the accounts alleged in the

complaint. The several counts are distinct causes of action; and the fact that by reason of one of them having been imperfectly stated, no judgment could be rendered on that count, does not affect the right of plaintiff to take judgment on those which are rightly stated. The rule in cases of default is different from that in cases of verdict; for in the latter, it is uncertain upon what bases or on which of the counts the jury rests its finding, whilst in the former, the law determines the fact and the amount of recovery. A default may as well be taken against a municipal corporation as against a private person. The rules of pleading are general; they were designed to embrace all persons, natural or artificial, capable of suing or being sued. *Hunt* v. *City of San Francisco*, 11 Cal. 250.

12. Plaintiff filed a complaint to which the defendant demurred and answered, and an amended complaint was filed to which defendant did not answer. As if issue was joined on the amended complaint and original answer, the parties went to trial, and no default was taken for failure to answer: held, the plaintiffs are precluded from objecting to this defect, after trying to hold the defendants on these pleadings in which he failed. *Gale* v. *Tuolumne Water Co.*, Cal. July T. 1859.

13. A default is a confession only of the material allegations in the complaint, which must be established to entitle the plaintiff to judgment. The default only admits the material and traversable matters set out in the complaint. A default for not answering in an action for assault and battery entitles the plaintiff to a judgment for only nominal damages. If he claims more damages, he must prove the facts that will entitle him to recover them. *Gilbert* v. *Rounds*, 14 How. Pr. 46.

14. A judgment by default based upon service of summons upon an elector on election day, is irregular. *Bierce* v. *Smith*, 2 Abbott, 411.

15. 1st. This section only refers to section thirty-two, when all the defendants are not served. *Stearns* v. *Aguirre*, 7 Cal. 443.

16. 2d. In ejectment to recover on prior possession, the want of an allegation in the complaint of an actual ouster, is a defect which cannot be cured by a default taken through the mistake of defendant's counsel. *Watson* v. *Zimmerman*, 6 Cal. 46.

17. The provision as to a reference sustained. *Emeric* v. *Tams*, 6 Cal. 155.

18. 3d. See section 68.

19. Defendant has forty days time to answer the complaint after the service of summons is made by three months publication. *Grewell* v. *Henderson*, 5 Cal. 465; *Dykers* v. *Woodward*, 7 How. Pr. 313.

20. A judgment obtained by publication of summons against a defendant then out of the state in which the judgment is rendered, though it may be enforced against his property in that state, has no binding force *in personam*, and is a mere nullity when attempted to be enforced in another state. *Kane* v. *Cook*, 8 Cal. 449.

CHAPTER III.

OF ISSUES, AND THE MANNER OF THEIR DISPOSITION.

151. An issue arises when a fact or conclusion of law is maintained by the one party, and is controverted by the other. Issues are of two kinds:

1st. Of law; and,

2d. Of fact.

152. [1854.*] An issue of law arises upon a demurrer to the complaint, or answer to some part thereof.

153. [1854.*] An issue of facts arises:

1st. Upon a material allegation in the complaint, controverted by the answer; and,

2d. Upon new matter in the answer, except an issue of law is joined therein.

154. An issue of law shall be tried by the court, unless it be referred, upon consent, as provided in chapter six of this title.

155. An issue of fact shall be tried by a jury, unless a jury trial is waived, or a reference be ordered, as provided in this act. Where there are issues both of law and fact to the same complaint, the issues of law shall be first disposed of.

156. The clerk shall enter causes upon the calendar of the court, according to the date of the issue. Causes once placed on the calendar for a general or special term, if not tried or heard at such term, shall remain upon the calendar from court to court, until finally disposed of.

157. Either party may bring the issue to trial, or to a hearing, and

* Statutes of 1854, 84.

in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict or judgment, as the case may require.

158. A motion to postpone a trial on the ground of the absence of evidence, shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

See section 664.

1. The moving party must show by affidavit sufficient diligence on his part, and that he did all in his power. *Frank* v. *Brady*, 8 Cal. 47.

2. Affidavits for continuance should show that the facts, expected to be proven by the absent witnesses, cannot otherwise be proven. *People* v. *Quincy*, ib. 89.

3. The refusing or granting a continuance rests in the sound discretion of the court below, and its rulings will not be revised except for the most cogent reasons. *Musgrove* v. *Perkins*, 9 Cal. 211.

4. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance, and if he fail to do this, he waives his want of preparation, and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner* v. *Morrison*, 11 ib. 21.

5. The granting or refusing a continuance rests in the sound discretion of the court below; and even when the facts show that the action of the court below approached nearly to an arbitrary exercise of its discretion, that action will not be reviewed unless there has been a motion for a new trial, and the application supported by the affidavits of the absent witnesses, if such affidavits can be obtained, or if not, then it should be shown to the court that they cannot be obtained. Unless this be done, this court will not interfere, in civil cases, with the action of the lower court. *Pilot Rock Creek Canal Co.* v. *Chapman*, ib. 161.

6. If the party admit that such testimony would be given, yet the court may rule it out as inadmissible. *Boggs* v. *Merced Mining Co.*, Cal. Oct. T. 1859.

CHAPTER IV.

TRIAL BY JURY.

ARTICLE I.

FORMATION OF THE JURY.

159. When the action is called for trial by jury, the clerk shall prepare separate ballots containing the names of the jurors summoned, who have appeared and not been excused, and deposit them in a box. He shall then draw from the box twelve names, and the persons whose names are drawn shall constitute the jury. If the ballots become exhausted before the jury is complete, or if from any cause a juror or jurors be excused or discharged, the sheriff shall summons, under the direction of the court, from the citizens of the county and not from bystanders, so many qualified persons as may be necessary to complete the jury. The jury shall consist of twelve persons, unless the parties consent to a less number. The parties may consent to any number not less than three. Such consent shall be entered by the clerk in the minutes of the trial.

1. The right of trial by jury cannot be waived by implication, but may be, in the mode prescribed by law. *Smith* v. *Pollock*, 2 Cal. 92; *Russell* v. *Elliott*, ib. 245; *Exline* v. *Smith*, 5 ib. 112.

2. A juror must be an elector in the county in which he is returned, and have resided in the county thirty days. *Sampson* v. *Schaffer*, 3 ib. 107.

3. Parties to a suit in chancery are not entitled to a trial by jury. *Walker* v. *Sedgwick*, 5 ib. 192; *Cahoon* v. *Levy*, ib. 294.

4. In chancery cases the trial by jury is but advisory to the court, and improper testimony and erroneous instructions can do no injury if justice has been rendered in the final result. *Still* v. *Saunders*, 8 ib. 281.

5. Special issues, framed by the court according to the established rules of chancery practice, may be tried by a jury in equity cases. *Brewster* v. *Bours*, ib. 501.

6. The objection to the qualification of a juror, that his name was not on the venire returned by the sheriff, comes too late after verdict. The objection, if it had any validity, should have been urged at the trial. *Thrall* v. *Smiley*, 9 Cal. 529.

7. When the sheriff is a party to the action, the court may order the cause tried by a special jury to be summoned by the coroner. *Pacheco* v. *Hunsacker*, Cal. October T. 1859.

160. As soon as the jury is completed, an oath or affirmation shall be administered to the jurors, in substance, that they, each of them, will well and truly try the matter at issue between ——— the plaintiff, and ——— the defendant, and a true verdict render according to the evidence.

161. Either party may challenge the jurors, but when there are several parties on either side they shall join in a challenge before it can be made. The challenges shall be to individual jurors, and shall either be peremptory or for cause. Each party shall be entitled to four peremptory challenges.

162. [1860.*] Challenges for cause may be taken on one or more of the following grounds:

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror;

2d. Consanguinity or affinity within the third degree to either party;

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent to either party; or being a member of the family of either party; or a partner in business with either party; or being security on any bond or obligation for either party;

4th. Having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;

5th. Interest on the part of the juror in the event of the action, or in the main question involved in the action, *except the interest of the juror as a member or citizen of a municipal corporation;*

6th. Having formed or expressed an unqualified opinion, or belief as to the merits of the action;

7th. The existence of a state of mind in the juror evincing enmity against, or bias to, either party.

1. In an action of ejectment, a juror who has formed an opinion adverse to the validity of title under which defendants claimed, is an incompetent juror. *White* v. *Moses*, 11 Cal. 68.

2. It is no disqualification that a juror has tried a case involving the liability of the

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* Statutes of 1860, 000.

defendant for a similar cause of action depending upon the same general considerations. *Algier* v. *Steamer Maria*, Cal. Oct. T. 1859.

3. It has always been considered a principal cause of challenge to a juror, that he is a tenant of either of the parties to the suit. *Hathaway* v. *Helmer*, 25 Barb. 29.

163. Challenges for cause shall be tried by the court. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.

ARTICLE II.

CONDUCT OF THE TRIAL.

164. If, after the impanneling of the jury, and before verdict, a juror become sick, so as to be unable to perform his duty, the court may order him to be discharged. In that case, the trial may proceed with the other jurors, or a new jury may be sworn, and the trial begin anew; or the jury may be discharged, and a new jury then or afterwards impanneled.

See section 663.

1. The withdrawal of a juror and continuance of a case thereby, is no ground for reversing a judgment subsequently obtained. *Benedict* v. *Cozzens*, 4 Cal. 381.

165. In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict; and if it state the testimony of the case it shall also inform the jury that they are the exclusive judges of all questions of fact. The court shall furnish to either party at the time, upon request, a statement in writing of the points of law contained in the charge; or shall sign at the time, a statement of such points prepared and submitted by the counsel of either party.

1. It seems improper to instruct the jury to take into consideration all the facts and do equal justice between all the parties—it may mislead them. *Kelly* v. *Cunningham*, 1 Cal. 366.

2. The charge of a judge to a jury should be given with reference to the testimony adduced on the trial; and where the charge is returned on appeal, but no portion of the testimony, the court will not undertake to determine as to the correctness or incorrectness of the charge. *People* v. *McCauley*, ib. 379.

3. The whole charge of the district judge should be taken together, and when considered in this way, if it appear that the jury have not been misled by it, a new trial

will not be granted; although some of the instructions may in slight respects be repugnant to each other. *Carrington* v. *Pacific M. S. S. Co.*, 1 Cal. 475.

4. The court must give or refuse instructions. The sense must not be altered, although the phraseology may be modified. *Fowler* v. *Smith*, 2 Cal. 39; *Conrad* v. *Lindley*, ib. 173; *Russel* v. *Amador*, 3 ib. 400; *Jamson* v. *Quivey*, 5 ib. 490.

5. The court should refuse to instruct the jury on abstract questions of law. *Fowler* v. *Smith*, 2 ib. 39; *Branger* v. *Chevalier*, 9 ib. 353.

6. An erroneous instruction may be assigned for error, if there be any evidence rendering it pertinent to the issue. *Buzzell* v. *Bennett*, 2 ib. 101.

7. It is error in the court to refuse to instruct the jury in accordance with the provisions of the 135th section of the act to regulate settlements of the estates of deceased persons, when requested so to do, and the evidence shows that it is proper and relevant. *Benedict* v. *Haggin*, ib. 385.

8. Where the complaint does not charge the mortgagee in possession with negligence or improper conduct, in leasing the mortgaged premises, but requires him to account for the rents he actually received, it is proper in the court to refuse to instruct the jury that he might have leased the property differently, and to charge him with what he might have received, if so leased. *Benham* v. *Rowe*, ib. 387.

9. The question of notice of dissolution of partnership, is a fact for the jury under the charge of the court. *Rabe* v. *Wells*, 3 ib. 148.

10. Where the counsel hand to the court a multiplicity of instructions which cannot be examined into for want of time, the court has discretion to refuse them. *Anderson* v. *Parker*, 6 ib. 197.

11. In a chancery case, where the jury are summoned to find certain issues of fact, which, when found, are not obligatory, but simply obtained for the purpose of informing the conscience of the chancelor, *it seems* that it is no error to refuse to instruct the jury as to what would be the law on a given state of facts. In such a case the jury find the facts, and if the court adopt the finding, it applies the law. *Dominguez* v. *Dominguez*, 7 ib. 424; *Branger* v. *Chevalier*, 9 ib. 353.

12. The court may refuse to give an instruction on the ground that it had been already substantially given by the court. *Belden* v. *Henriquez*, 8 ib. 87.

13. In an action for malicious prosecution, it is error to submit to the jury whether there was probable cause; the court should determine that question. *Potter* v. *Seale*, ib. 217.

14. Instructions to the jury are properly refused when not warranted by the pleadings. *Thompson* v. *Lee*, ib. 275.

15. An instruction to the jury "to find for the defendant, as plaintiff had failed to prove a redemption," is clearly erroneous. The question of redemption was the main point in issue. *Battersby* v. *Abbott*, 9 ib. 565.

16. It is error for the court to charge the jury as to a question of fact, or as to the weight of evidence. Ib.

17. The naked directions of a court to the jury, unaccompanied with a statement of facts, will not satisfy this court of substantial error, although some of the directions may not be in consonance with the rules of law. *Nelson* v. *Lemmon*, 10 ib. 49.

18. Errors assigned upon instructions given by the court below, will not be consid-

ered by this court, unless there is an authenticated statement of the evidence to show the pertinency or relevancy of such instructions. *Nelson* v. *Mitchell*, 10 Cal. 92.

19. Instructions to a jury will not be disturbed by an appellate court on the ground that there was no evidence upon which to base them, when there was slight evidence. *Perlberg* v. *Gorham*, ib. 120.

20. A request to charge the jury should be in such a form that the court may charge in the terms of the request, without qualification. *Carpenter* v. *Stillwell*, 1 Kern. 61.

21. The refusal of the judge to charge the jury as particularly requested, is not error, where he had previously charged them in substance as requested. *Holbrook* v. *Utica and Schenectady R. R. Co.*, 2 ib. 236.

22. A judge is bound to instruct a jury upon each proposition of law submitted to him by counsel, bearing upon the evidence. *Zabriskie* v. *Smith*, 3 ib. 322.

23. How far it is necessary and proper for the judge to refer to and comment upon the evidence, in the charge, is a question of discretion. *Poler* v. *N. Y. Central R. R. Co.*, 16 N. Y. 476.

24. The judge has no right to intimidate a jury who are unable to agree upon a verdict, or to affect their deliberations. *Green* v. *Telfair*, 11 How. Pr. 260.

166. After hearing the charge, the jury may either decide in court, or retire for deliberation. If they retire, they shall be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict, or are discharged by the court. The officer shall, to the utmost of his ability, keep the jury together separate from other persons; he shall not suffer any communication to be made to them, or make any himself, unless by order of the court, except to ask them if they have agreed upon their verdict; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.

167. Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause; or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony, or other proceedings on the trial, taken by themselves, or any of them; but none taken by any other person.

168. After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they

desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the parties or counsel.

1. It was error after the jury had retired, to allow them to come into court and instruct them in the absence of the parties or their counsel. *Redman* v. *Gulnack*, 5 Cal. 148.

169. In all cases where a jury are discharged, or prevented from giving a verdict, by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court shall direct.

170. While the jury are absent the court may adjourn, from time to time, in respect to other business; but it shall nevertheless be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered, or the jury discharged. The court may direct the jury to bring in a sealed verdict, at the opening of the court, in case of an agreement during a recess, or adjournment for the day. A final adjournment of the court for the term shall discharge the jury.

171. When the jury have agreed upon a verdict, they shall be conducted into court by the officer having them in charge. Their names shall then be called, and they shall be asked by the court, or the clerk, whether they have agreed upon their verdict; and if the foreman answer in the affirmative, they shall, on being required, declare the same.

172. If the verdict be informal or insufficient, in not covering the whole issue or issues submitted, the verdict may be corrected by the jury under the advice of the court, or the jury may be again sent out.

1. The verdict of a jury may be amended or corrected so as to conform to the facts, where there is no doubt as to such facts and of the real intentions of the jury. *Truebody* v. *Jacobson*, 2 Cal. 263; *Perkins* v. *Wilson*, 3 Cal. 137; *Little* v. *Larrabee*, 2 Greenl. 37; *Burhans* v. *Tibbits*, 7 How. Pr. 21.

173. When the verdict is given, and is not informal or insufficient,

the clerk shall immediately record it, in full, in the minutes, and shall read it to the jury, and inquire of them whether it be their verdict. If any juror disagree, the jury shall be again sent out; but if no disagreement be expressed the verdict shall be complete, and the jury shall be discharged from the case.

1. If the record shows what the verdict is, the affidavit of jurors will not be taken to contradict it. *Ansby* v. *Dickhouse*, 4 Cal. 102; *Wilson* v. *Berryman*, 5 Cal. 44; *Castro* v. *Gill*, ib. 40.

2. The court shall direct the verdict of a jury to be recorded as rendered by it. That should be treated as the verdict which the jury actually brings in. *Moody* v. *McDonald*, 4 Cal. 297.

3. The verdict as recorded need not be put in a statement on appeal. *Reynolds* v. *Harris*, 8 Cal. 617.

ARTICLE III.

THE VERDICT.

174. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the court. The special verdict shall present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing shall remain to the court but to draw from them conclusions of law.

1. The finding of a jury will not be disturbed:

a. Unless impeached for fraud, misconduct, or mistake. *Payne* v. *Jacobs*, 1 Cal. 39; *Perry* v. *Cochran*, ib. 180; *George* v. *Law*, ib. 363.

b. Where the evidence in a new trial would warrant the same verdict. *Tohler* v. *Folsom*, 1 Cal. 207.

c. For conflicting evidence. *Johnson* v. *Pendleton*, 1 Cal. 132; *Vogan* v. *Barrier*, ib. 186; *Hoppe* v. *Robb*, ib. 373; *Dwinelle* v. *Henriquez*, ib. 387; *Ansby* v. *Dickhouse*, 4 Cal. 102; *Duell* v. *Bear River Co.*, 5 ib. 84; *Adams* v. *Pugh*, 7 ib. 150; *White* v. *Todd's Valley Water Co.*, 8 Cal. 443; *People* v. *Ah Ti*, 9 Cal. 16; *Scannell* v. *Strahle*, 9 Cal. 177; *Weddle* v. *Stark*, 10 ib. 301; *McGarrity* v. *Byington*, 12 Cal. 427.

d. If incompetent evidence had no influence on the jury. *Mateer* v. *Brown*, 1 Cal. 231; *Persse* v. *Cole*, ib. 369; *Panaud* v. *Jones*, ib. 488; *Priest* v. *Union Canal Co.*, 6 Cal. 170.

2. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject mat-

ter of the suit, where no objection was made to him until after the verdict was rendered; and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of the plaintiff. *Lawrence* v. *Collier*, 1 Cal. 37.

3. The finding of a jury on questions of fact is final and conclusive. *Perry* v. *Cochran*, 1 Cal. 180; *Escolle* v. *Merle*, 9 Cal. 94.

4. Where the verdict is clearly contrary to evidence the court will reverse the judgment. *Acquital* v. *Crowell*, 1 Cal. 191; *Bagley* v. *Eaton*, 8 Cal. 159; *Easterling* v. *Power*, 12 ib. 88.

5. A verdict may be amended in form so as to make it good in law, but must not affect the substance. *Truebody* v. *Jacobson*, 2 Cal. 269; *Perkins* v. *Wilson*, 3 Cal. 137; *Little* v. *Larrabee*, 2 Greenl. 37; *Burhans* v. *Tibbits*, 7 How. Pr. 21.

6. Jurors will not be allowed to impeach their own verdict. *Ansby* v. *Dickhouse*, 4 Cal. 102; *Castro* v. *Gill*, 5 Cal. 40; *Wilson* v. *Berryman*, 5 ib. 44; *Green* v. *Bliss*, 12 How. Pr. 428.

7. An informal verdict, if consented to and entered, the informality will not be reviewed. *Treadwell* v. *Wells*, 4 Cal. 260.

8. Where the verdict is the result of a computation of aggregation and division, it is bad. *Wilson* v. *Berryman*, 5 Cal. 44; *Conklin* v. *Hill*, 2 How. Pr. 6.

9. A joint verdict against a defendant answering, and a defaulting defendant, is conclusive against all, where a separate verdict has not been demanded. *Anderson* v. *Parker*, 6 Cal. 197.

10. The general rule as to the effect of a verdict upon defects in pleading is, that whenever facts are not expressly stated, which are so essential to a recovery that without proof of them on the trial, a verdict could not have been rendered under the direction of the court, then the want of the express statement is cured by the verdict, provided the complaint contains terms sufficiently general to comprehend the facts in fair and reasonable intendment. *Garner* v. *Marshall*, 9 Cal. 268.

11. Counsel cannot object that the court did not render a judgment in a special verdict, where they stipulated that the judge may find the additional facts to present all the questions raised by the pleadings. *Marius* v. *Bicknell*, 10 Cal. 217.

12. A verdict cannot remunerate for loss of time, wages paid, &c., unless there is an allegation in the complaint as to these matters. *Dabovich* v. *Emeric*, 12 Cal. 172.

13. The court may set aside the verdict in an equity case. *Duff* v. *Fisher*, Cal. April T. 1860.

14. Affidavits of counsel and others, on information respecting misbehavior of the jury while considering their verdict, are not admissible to impeach the verdict. *People* v. *Hartung*, 8 Abbott, 132; *People* v. *Wilson*, ib. 137.

15. Jurors will be allowed to refute any inference of improper conduct, although they may not approve such conduct. *Downer* v. *Baxter*, Vermont supreme court, 1857; 10 Law Reporter, N. S., 49.

175. [1854.*] In an action for the recovery of money only, or

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* Statutes of 1854, 84.

specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict of finding shall be filed with the clerk, and entered upon the minutes; where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

1. The court may direct a special verdict to be entered in the action. *Burritt* v. *Gibson*, 3 Cal. 396.

2. A general verdict will conclude all parties who do not answer separately, or demand separate verdicts. *Winans* v. *Christy*, 4 Cal. 70; *Ellis* v. *Jeans*, 7 Cal. 409.

3. The party in whose favor a judgment is rendered on a special verdict, must move for a new trial if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate court. *Garwood* v. *Simpson*, 8 Cal. 101.

176. When a verdict is found for the plaintiff, in an action for the recovery of money, or for the defendant, when a counter claim for the recovery of money is established, exceeding the amount of the plaintiff's claim as established, the jury shall also find the amount of the recovery.

See section 47.

177. In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant, by his answer, claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property, and may at the same time, assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.

1. The measure of damages for property converted is the value thereof, with legal interest from the time of conversion, and when the value is fluctuating, the plaintiff may recover the highest value at the time of the conversion or at any time afterwards. *Nickerson* v. *Chatterton*, 7 Cal. 568; *Douglas* v. *Kraft*, 9 Cal. 562.

2. Where there is no verdict by a jury, as in a case of non-suit or discontinuance, the value of the property need not be found. The value may be found by a jury called in an action on the undertaking. *Ginaca* v. *Atwood*, 8 Cal. 446.

3. If the plaintiff takes the property, the defendant must claim its return in his answer, in order to enable the court to give the alternate judgment. *Gould* v. *Scannell*, Cal. April T. 1859.

4. This verdict must be in the alternative for a return of the property, or for the value thereof, as assessed in case a return cannot be had. *Dwight* v. *Enos*, 5 Seld. 470.

178. Upon receiving a verdict, an entry shall be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and the verdict; and where a special verdict is found, either the judgment rendered thereon, or if the case be reserved for argument or further consideration, the order thus reserving it.

1. If the record shows what the verdict is, the affidavit of jurors will not be taken to contradict it. *Ansby* v. *Dickhouse*, 4 Cal. 102: *Wilson* v. *Berryman*, 5 Cal. 44; *Castro* v. *Gill*, ib. 40.

2. The court shall direct the verdict of a jury to be recorded as rendered by it. That should be treated as the verdict which the jury actually brings in. *Moody* v. *McDonald*, 4 Cal. 297.

3. The verdict as recorded need not be put in a statement on appeal. *Reynolds* v. *Harris*, 8 Cal. 617.

CHAPTER V.

TRIAL BY THE COURT.

179. Trial by jury may be waived by the several parties to an issue of fact, in actions arising on contract; and with the assent of the court in other actions, in the manner following:

1st. By failing to appear at the trial.

2d. By written consent, in person or by attorney, filed with the clerk.

3d. By oral consent in open court, entered in the minutes. The court may prescribe by rule what shall be deemed a waiver in other cases.

1. 1st. The mere act of filing an answer does not operate as an appearance at the trial so as to prevent the waiver of a jury trial. *Zane* v. *Crow*, 4 Cal. 112.

2. 3d. "The court may prescribe by rule," held unconstitutional. *Exline* v. *Smith*, 5 Cal. 112.

3. The failure of the defendant to appear at the trial of an action of replevin when the cause is called, is the waiver of a jury. *Waltham* v. *Carson*, 10 Cal. 178.

180. Upon the trial of an issue of fact by the court, its decision shall be given in writing, and filed with the clerk, within ten days after the trial took place. In giving the decision, the facts found and the conclusions of law, shall be separately stated. Judgment upon the decision shall be entered accordingly.

1. When the cause is tried by a judge without a jury, the record must disclose the finding by him of the facts and a statement of his conclusions of law upon the case, without which there is no basis to support a judgment. *Hoagland* v. *Clary*, 2 Cal. 474; *Russel* v. *Armador*, 2 Cal. 305; *Brown* v. *Brown*, 3 Cal. 111; *Estell* v. *Chenery*, ib. 467.

2. The ten days are only directory. *Vermule* v. *Shaw*, 4 Cal. 214; *Burger* v. *Baker* 4 Abbott, 11.

3. This does not apply in chancery cases. *Walker* v. *Sedgwick*, 5 Cal. 192.

4. In equity cases, although no motion for a new trial is made, the appellate court will not hold the findings of fact by the court below to be conclusive. *Dewey* v. *Bowman*, 8 Cal. 145.

5. Where a judgment was rendered by confession in open court upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot at the instance of one not a party to the judgment be invoked to set aside or show the judgment a nullity. *Cloud* v. *El Dorado county*, 12 Cal. 128.

6. A verdict, "That the facts stated in the plaintiff's complaint are true, and the facts stated in the defendant's answer are not true," held good. The finding may refer to the pleadings if sufficiently distinct to make it intelligible. *McEwen* v. *Johnson*, 7 Cal. 258.

7. There is no necessity of a finding as to a fact admitted by the pleadings. A finding only is required when the allegation of a material fact in the complaint is controverted by the answer. *Swift* v. *Muygridge*, 8 ib. 445.

8. This decision in writing should embrace a distinct determination of the material issues raised by the pleadings. A mere direction to enter a certain judgment is not a compliance with the section. *Burger* v. *Baker*, 4 Abbott, 11.

181. On a judgment upon an issue of law, if the taking of an account be necessary to enable the court to complete the judgment, a reference may be ordered.

CHAPTER VI.

OF REFERENCES, AND TRIAL BY REFEREES.

182. A reference may be ordered upon the agreement of the parties, filed with the clerk, or entered in the minutes:

1st. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a judgment thereon.

2d. To ascertain a fact necessary to enable the court to proceed and determine the case.

1. A reference cannot be made without consent of the adverse party. *Seaman* v. *Mariani*, 1 Cal. 336; *Smith* v. *Pollock*, 2 ib. 92; *Benham* v. *Rowe*, ib. 261.

2. Our statute concerning referees is in aid of common law remedy by arbitration, and does not alter its principles. *Tyson* v. *Wells*, 2 Cal. 122.

3. Hearsay and irrelevant testimony should be excluded by referees. *De la Riva* v. *Berreyesa*, ib. 195.

4. Referees should exclude items barred by statute of limitation, if objected to. Ib.

5. When an entry upon the minutes recites that "the parties came by their attorneys, and defendant by his attorney moved the court that the cause be referred:" held, that such reference was made on the appellant's motion, and in one of the modes pointed out by law, "by oral consent in open court, entered on the minutes." *Bates* v. *Visher*, 2 Cal. 355.

6. The above held not to apply to equity cases. *Smith* v. *Rowe*, 4 ib. 6.

7. Where a referee admits the testimony of a witness against the objection of the defendant, such testimony cannot, after the case has been submitted, be thrown out without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony. *Monson* v. *Cooke*, 5 ib. 436.

8. Referees have no power to allow parties to alter pleadings. Ib.; *Bonesteel* v. *Lynde*, 8 How. Pr. 226, 352.

9. A referee appointed merely to take an account between two parties, differs materially from a referee appointed in the stead of the court, to try and determine a cause, and an order setting aside his report is merely interlocutory and not the subject of appeal. *Johnston* v. *Dopkins*, 6 Cal. 83.

10. An order of reference cannot go beyond the pleadings of the parties. *Branger* v. *Chevalier*, 9 ib. 353.

11. The referee in divorce cases under the statute, is simply a master to take testimony. *Baker* v. *Baker*, 10 ib. 527.

12. Where a reference is had to take an account, it is within the discretion of the referees to open the case after it has been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in case of gross abuse, will not be reviewed on appeal. *Marziou* v. *Pioche*, ib. 545.

13. Although parties may agree to a suitable person for a referee, the court must be satisfied that the selection is a proper one. *Litchfield* v. *Burwell*, 4 How. Pr. 341.

14. An order to refer a cause brought to recover upon an account, is not an appealable order. *Ubsdell* v. *Root*, 3 Abbott, 142.

15. When a party proceeds to try a cause under an order of reference, he thereby waives any right to appeal from that order. Ib.

183. When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1st. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein;

2d. When the taking of an account is necessary for the information of the court before judgment, or for carrying a judgment or order into effect;

3d. When a question of fact, other than upon the pleadings, arises upon motion or otherwise, in any stage of the action; or,

4th. When it is necessary for the information of the court in a special proceeding.

1. Action for balance of account, defense, payment by a promissory note, replication, that plaintiff was induced to receive the note by means of fraudulent representations: held, that the case was not referable under the statute, without the written consent of both parties. *Seaman* v. *Mariani*, 1 Cal. 336.

2. The court may order a reference to ascertain damages by an injunction issued without a cause. *Russell* v. *Elliott*, 2 ib. 245.

3. Damages for unlawful detainer is not subject to reference, unless by consent. *Geeseka* v. *Brannan*, ib. 517.

4. A reference, in which there is no order of court, or agreement, filed or entered on the minutes, withdraws the cause from the jurisdiction of the court, and no judgment can be entered upon the report without consent. *Heslep* v. *City of San Francisco*, 4 Cal. 1.

5. An order of reference is not a final order of judgment to be appealed from. *Harris* v. *Clark*, 4 How. Pr. 78.

6. When a reference is necessary in order to ascertain the amount for which judgment is to be given, judgment cannot be entered until the accounting has been had, and everything essential to the judgment has been ascertained. *McMahon* v. *Allen*, 7 Abbott, 1.

184. A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge shall appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection.

See section 529.

1. The referees need not be sworn. *Sloan* v. *Smith*, 3 Cal. 406.

2. A referee has no power to strike out a complaint, nor to punish for contempt. *Bonesteel* v. *Lynde*, 8 How. Pr. 226, 352.

185. Either party may object to the appointment of any person as referee, on one or more of the following grounds:

1st. A want of any of the qualifications prescribed by statute to render a person competent as a juror.

2d. Consanguinity or affinity within the third degree, to either party.

3d. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal and agent, to either party; or being a member of the family of either party; or a partner in business with either party; or being security on any bond or obligation for either party.

4th. Having served as a juror, or been a witness on any trial between the same parties for the same cause of action.

5th. Interest on the part of such person in the event of the action, or in the main question involved in the action.

6th. Having formed or expressed an unqualified opinion or belief as to the merits of the action.

7th. The existence of a state of mind in such person evincing enmity against, or bias to, either party.

186. The objections taken to the appointment of any person as referee, shall be heard and disposed of by the court. Affidavits may be read, and any person examined as a witness as to such objections.

187. The referees shall make their report within ten days after the testimony before them is closed. Their report upon the whole issue shall stand as the decision of the court, and upon filing the report with the clerk of the court, judgment may be entered thereon, in the same manner as if the action had been tried by the court. The decision of the referees may be excepted to, and reviewed in like manner as if made by the court. When the reference is to report the facts, the report shall have the effect of a special verdict.

1. The report of a referee upon the facts of a case will be considered the same as the verdict of a jury. *Walton* v. *Minturn*, 1 Cal. 362; *Goodrich* v. *The Mayor of Marysville*, 5 ib. 430.

2. The report of a referee must be objected to in a court below. *Porter* v. *Barling*, 2 ib. 72; *Goodrich* v. *The Mayor of Marysville*, 5 ib. 430; *Branger* v. *Chevalier*, 9 ib. 353; *Inches* v. *Van Valkenburgh*, Cal. Oct. T. 1859.

3. The report of a referee will be set aside for fraud, mistake or accident. *Muldrow* v. *Norris*, 2 Cal. 74; *Tyson* v. *Wells*, ib. 122.

4. It must be taken advantage of by moving to set it aside, as on motion for a new trial. *Sloan* v. *Smith*, 3 Cal. 406; *Grayson* v. *Guild*, 4 ib. 122.

5. Exceptions must be taken to the rulings of a referee during the trial, and certified by him. *Tyson* v. *Wells*, 2 ib. 122; *Phelps* v. *Peabody*, 7 ib. 50.

6. A referee has no right to bring in and file an additional or amended report. The original report alone will be considered. *Headley* v. *Reed*, 2 ib. 322.

7. A report not made immediately after the close of the testimony, is deemed excepted to. Ib.

8. The court cannot entertain objections to the report until after the rendition of the judgment. Ib.

9. The report of a referee is essentially the same as the award of an arbitration. *Headley* v. *Reed*, 2 Cal. 322; *Grayson* v. *Guild*, 4 ib. 122.

10. The report of a referee should state the facts found, and conclusions of law thereupon. *Lambert* v. *Smith*, 3 Cal. 408; *Church* v. *Erben*, 4 Sand. 691; *Van Steenburgh* v. *Hoffman*, 6 How. Pr. 492; *Mills* v. *Thursby*, 12 ib. 417; *Deming* v. *Post*, 1 Code R. 131.

11. The supreme court, in a chancery case, will correct the errors of an erroneous judgment on the report of a referee, or the erroneous setting aside of the same. *Grayson* v. *Guild*, 4 Cal. 122.

12. The correctness of the order setting aside the report of facts found by the referee, if it was questioned and excepted to, can be reviewed upon appeal after final judgment. *McHenry* v. *Moore*, 5 ib. 90.

13. Where a party failed to obtain the proper certificate of the referee, relying on the verbal assurance of the attorney on the other side, that he would agree to a statement, such party cannot be considered free from fault and negligence, and he is not in a position to invoke the aid of a court of equity to enjoin a judgment obtained against him. *Phelps* v. *Peabody*, 7 ib. 50.

14. The time within which a notice of motion must be filed, to set aside the report of a referee and a statement be prepared for that purpose, will depend upon the character of the reference; whether it be special, to report facts, or general, to report upon the whole issue. In the former case, the report has the effect of a special verdict; in the latter, it stands as the decision of the court. The time within which the notice of motion to set aside the report or verdict must be given, should be the same in the two cases, and date from the filing of the report, or the rendition of the verdict. *Peabody* v. *Phelps*, 9 ib. 213.

15. The manner in which decisions of referees should be excepted to and reviewed, fully discussed. *Johnson* v. *Whitlock*, 3 Kern. 344.

16. A referee taking the place of a jury, if it appear the report of a referee upon questions of fact has been affected by any influence exercised by the successful party, it will be set aside for irregularity. *Yale* v. *Gwinits*, 4 How. Pr. 253; *Dorlon* v. *Lewis*, 9 ib. 1.

17. The referee has no authority to report that the defendant is entitled to judgment of a dismissal of the complaint, nor to order an amendment of the pleadings, or change the issue which the court has set to be tried. *Holmes* v. *Slocum*, 6 ib. 217.

18. The examination by the court of a report in reference. *Lakin* v. *New York and Erie R. R. Co.*, 11 ib. 412.

19. When a new trial is granted from a judgment in the report of a referee, the case should be tried before a new referee. *Schemerhorn* v. *Van Alen*, 13 How. Pr. 82.

20. The court, under section sixty-eight, may allow exceptions to the report of a referee to be filed *nunc pro tunc*, after the time allowed. *Sheldon* v. *Wood*, 14 ib. 18.

CHAPTER VII.

GENERAL PROVISIONS RELATING TO TRIALS.

ARTICLE I.

EXCEPTIONS.

188. An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial, to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial, or on an appeal, unless the exception be material, and affect the substantial rights of the parties.

1. Where the court below tries the cause without a jury, the proper mode of reserving questions of law, is to ask the court to decide them, and note the refusal in a bill of exceptions. *Griswold* v. *Sharpe*, 2 Cal. 17.

2. In chancery cases the jury trial is but advisory, and improper testimony and erroneous instructions work no injury, if justice has been rendered by the court. *Still* v. *Saunders*, 7 ib. 281.

3. Where no exception is taken to the order of the court below overruling a motion to set aside the judgment and quash the execution, such order cannot be reviewed by the appellate court. *Smith* v. *Curtis*, ib. 584.

4. Every error is *prima facie* an injury to the party against whom it is made, and it rests with the other party clearly to show, not that probably no hurt was done, but that none could have been, or was done by the error. *Jackson* v. *Feather River and Gibsonville Water Co.*, Cal. July T. 1859.

5. An objection that the case made by the evidence varies from that stated in the complaint, cannot prevail on a review unless it was made at the trial. *Barnes* v. *Perine*, 2 Kern. 18.

189. The point of the exception shall be particularly stated, and may be delivered in writing to the judge; or, if the party require it, shall be written down by the clerk. When delivered in writing, or

written down by the clerk, it shall be made conformable to the truth, or be at the time corrected, until it is so made conformable. When not delivered in writing, or written down as above, it may be entered in the judge's minutes, and afterwards settled in a statement of the case, as provided in this act.

1. A mere transcript of the evidence taken down by the clerk is no part of the record, unless made so by bill of exceptions. *Wilson* v. *Middleton*, 2 Cal. 54.

2. Where, under the 271st [663] section of the act to regulate proceedings in civil cases, the evidence is taken down by the clerk in the court below, on motion of a party, a transcript of it certified by him is a substitute for a bill of exceptions, or statement of facts, in the absence of such bill or statement. Decisions contravening the plain letter of the statute are not binding as authority. *Ingraham* v. *Gildermester*, ib. 161.

3. Documents and affidavits, to be reviewed by the appellate court, must be embodied in the bill of exceptions or record. *Gates* v. *Buckingham*, 4 ib. 286.

4. The objections to the form of a deed must be made on the trial at nisi prius. *Posten* v. *Rassette*, 5 ib. 468.

5. Objections to the introduction of evidence must be taken on the trial below; they cannot be taken for the first time in the appellate court. *Covillaud* v. *Tanner*, 7 ib. 38; *Potter* v. *Carney*, 8 ib. 574.

6. A party cannot take his chances for a verdict on instructions given or refused, without exception taken, and then, after verdict, except to the action of the court upon motion for a new trial. *Letter* v. *Putney*, 7 ib. 423.

7. Instruments are sometimes admissible for one purpose and inadmissible for another, and when objected to, the grounds of the objection should be stated; and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objection taken. *Prevost* v. *Piper*, 9 ib. 552.

8. Where a party objects to the admission of testimony, on trial, he must state the point of his objection at the time. General objection will not do. The party should lay his finger on the point at the time of trial, otherwise the appellate court cannot review it. *Martin* v. *Travers*, 12 ib. 243.

9. Exceptions which appear as settled in the case, will, on appeal, be assumed to have been duly taken. *Hunt* v. *Bloomer*, 3 Kern. 342.

190. No particular form of exception shall be required. The objection shall be stated, with so much of the evidence or other matter, as is necessary to explain it, but no more; and the whole as briefly as possible.

1. Where an exception is taken to the decision of a court refusing a non-suit, it devolves on the plaintiff, on the settlement of the bill, to see that all the evidence material for him in sustaining the decisions complained of, is inserted in the bill of exceptions. *Ringgold* v. *Haven*, 1 Cal. 108.

191. When a cause has been tried by the court, or by referees,

and the decision or report is not made immediately after the closing of the testimony, the decision or report shall be deemed excepted to, on a motion for a new trial, or on appeal, without any special notice that an exception is taken thereto.

1. This provision sustained. *Headley* v. *Reed*, 2 Cal. 322.

ARTICLE II.

NEW TRIALS.

192. A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referees.

1. A new trial should not be granted where it is apparent the verdict of the jury would be the same. *Tohler* v. *Folsom*, 1 Cal. 207; *Buckelew* v. *Chipman*, 5 ib. 399.

2. The power to grant new trials is one of legal discretion; the abuse of it will only justify interference by an appellate court. *Drake* v. *Palmer*, 2 ib. 177; *Bartlett* v. *Hogden*, 3 ib. 55; *Speck* v. *Hoyt*, 3 ib. 413; *Taylor* v. *McKinley*, 4 ib. 104; *Watson* v. *McClay*, ib. 228; *Duell* v. *Bear River Co.*, 5 ib. 84; *Wood* v. *Fobes*, ib. 62; *Wilson* v. *Berryman*, ib. 44.

3. A new trial should be granted where justice requires it. *Ross* v. *Austill*, 2 ib. 183; *Bartlett* v. *Hogden*, 3 ib. 55; *Hoyt* v. *Saunders*, 4 ib. 345; *Pinkham* v. *McFarland*, 5 ib. 137.

4. The court may impose terms upon granting a new trial. *Battelle* v. *Connor*, 6 ib. 140.

5. When a motion for a new trial should be made prior to appeal. *Brown* v. *Telles*, 7 ib. 398; *Dewey* v. *Bowman*, 8 ib. 145.

6. In matters of contested elections, the county court has the power to grant or refuse a new trial, otherwise the appellate power of the supreme court could not be properly or efficiently exerted. *Dickinson* v. *Van Horn*, 9 ib. 207.

7. There is no substantial difference between a rehearing in an equity case which opens a decree and places the case before the court for trial anew, and a new trial in a case at law, tried and decided by the court. *Riddle* v. *Baker*, Cal. April T. 1859.

193. The former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

1st. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

2d. Misconduct of the jury.

3d. Accident or surprise, which ordinary prudence could not have guarded against.

4th. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.

5th. Excessive damages, appearing to have been given under the influence of passion or prejudice.

6th. Insufficiency of the evidence to justify the verdict, or other decision, or that it is against law.

7th. Error in law, occurring at the trial, and excepted to by the party making the application.

1. When a new trial is granted from a judgment on the report of a referee, the case should be tried before a new referee. *Schemerhorn* v. *Van Alen*, 13 How. Pr. 82.

2. It is not error in the court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment. *Chapin* v. *Bourne*, 8 Cal. 294.

3. 1st. Whenever facts are not expressly stated, which are so essential to a recovery, that without proof of them on the trial a verdict could not have been rendered under the direction of the court, there the want of the express statement is cured by the verdict, provided, the complaint contain terms sufficiently general to comprehend the facts in fair and reasonable intendment, otherwise the verdict will be vacated. *Garner* v. *Marshall*, 9 ib. 268.

4. 3d. Where surprise is set up by non-attendance of witness, reasonable diligence must be shown. *Rogers* v. *Huie*, 1 ib. 429; *Bartlett* v. *Hogden*, 3 ib. 55; *Brooks* v. *Lyon*, ib. 113.

5. Surprise at the ruling of the court, on the trial, as to the admission of testimony, is not ground for a new trial. *Fuller* v. *Hutchings*, 10 ib. 523.

6. Surprise requires a continuance. *Ross* v. *Austill*, 2 ib. 183.

7. Surprise at the evidence given by defendant's witnesses, is not sufficient ground for a new trial. He should submit to a non-suit and not take his chance for a verdict. *Live Yankee Co.* v. *Oregon Co.*, 7 ib. 40.

8. Surprise may be ground for a new trial in case of non-suit. *Taylor* v. *Frost*, 2 How. Pr. 214.

9. 4th. The newly discovered evidence should be set forth in full, on motion. *Perry* v. *Cochran*, 1 Cal. 180; *Burritt* v. *Gibson*, 3 ib. 396.

10. The newly discovered evidence must appear to be incontrovertible and conclusive. *Bartlett* v. *Hogden*, ib. 55; *Buckelew* v. *Chipman*, 5 ib. 399.

11. The new evidence must not be merely cumulative. *Gaven* v. *Dopman*, ib. 342; *Taylor* v. *Cal. Stage Co.*, 6 ib. 228; *Live Yankee Co.* v. *Oregon Co.*, 7 ib. 40.

12. A new trial will not be granted if such evidence was within reach, and by ordinary diligence might have been procured. *Berry* v. *Metzler*, ib. 418; *People* v. *Marks*, 10 How. Pr. 261.

13. A new trial will not be granted on the ground of newly discovered evidence, which is alleged to be a deed, recorded in the county recorder's office a year before the trial, and the record of a judgment in the same court in which the cause was tried. *Weimer* v. *Lowery*, 11 Cal. 104.

14. On a motion for a new trial on the ground of newly discovered evidence, the affidavit of one of the defendants as to what an absent witness will testify, is insufficient. It should be accompanied by the affidavit of the witness himself; if that cannot be obtained in time, additional time should be applied for. *Jenny Lind Co.* v. *Bowers*, ib. 194.

15. It is only when a party is wholly free from negligence in preparing for the trial, that he is entitled to a new trial on the ground of newly discovered evidence. *Leavy* v. *Roberts*, 8 Abbott, 310.

16. 5th. *Payne* v. *Pacific M. S. S. Co.*, 1 Cal. 33; *George* v. *Law*, ib. 363; *Potter* v. *Seale*, 5 ib. 410; *Blum* v. *Higgins*, 3 Abbott, 104.

17. 6th. If improper evidence be permitted to be given to a jury, a new trial will be granted, unless the court can see that such evidence could have had no influence upon the verdict. *Santillan* v. *Moses*, 1 Cal. 92.

18. Where, on appeal, the complaint is so radically defective as not to authorize the judgment of the court below, a new trial may be granted, with leave to the plaintiff to amend his complaint on such terms as the court below may deem just. *Sterling* v. *Hanson*, ib. 478.

19. The mere fact that the plaintiff's counsel read, in his address to the jury, a portion of an answer which had been stricken out, is not error of itself. Errors cannot be relied on, in an appellate court, which are not taken advantage of and raised in the court below. *Morgan* v. *Hugg*, 5 ib. 409.

20. Where no motion for a new trial is made, the appellate court cannot examine to see whether it warrants the findings. *Covillaud* v. *Tanner*, 7 ib. 38.

21. A new trial will be granted where the verdict is the result of mistake or prejudice. *Bagley* v. *Eaton*, 8 ib. 159.

194. When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it shall be made upon affidavit; for any other cause it shall be made upon a statement prepared as provided in the next section.

195. The party intending to move for a new trial shall give notice of the same within two days after the trial, and shall, within five days after such notice, prepare and file with the clerk the affidavit required by the last section, or a statement of the grounds upon which he intends to rely. If no affidavit or statement be filed within five days after the notice, the right to move for a new trial shall be deemed waived. The statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the grounds taken, and

no more. Such statement, when containing any portion of the evidence of the case, and not agreed to by the adverse party, shall be settled by the judge upon notice. (*a*) On the argument, reference may also be made to the pleadings, depositions, and documentary evidence on file, and to the minutes of the court. If the application be made upon affidavits filed, the adverse party may use counter affidavits on the hearing. Any counter affidavits shall be filed with the clerk one day, at least, previous to the hearing.

1. A motion for a new trial must be noticed within statute time. *Elliott* v. *Osborne*, 1 Cal. 396; *Dennison* v. *Smith*, ib. 437; *Caney* v. *Silverthorn*, 9 Cal. 67; *Wing* v. *Owen*, ib. 247; *Lafferty* v. *Brownlee*, 11 Cal. 132.

2. If no statement be filed, the order will be set aside. *Leech* v. *Allen*, 2 Cal. 95; *Hill* v. *White*, 4 Cal. 306.

3. The statement must be agreed to or signed by the judge. *Linn* v. *Twist*, 3 Cal. 89; *Harley* v. *Young*, 4 Cal. 284: *Survey* v. *Wells*, 5 Cal. 124.

4. We are not disposed to extend the principle of the case of *Linn* v. *Twist* to any other case not strictly parallel in its substantial circumstances. The amendments to section 339, made since that decision, though applying to statements on appeal, by parity of reasoning, would apply to statements on new trials. *Dickinson* v. *Van Horn*, 9 Cal. 207.

5. A motion for a new trial stays the operation of the judgment until it can be heard and determined, and is not affected by the adjournment of the court. *Lurvey* v. *Wells*, 4 Cal. 106.

6. The court may impose terms in granting or refusing a new trial. *Benedict* v. *Cozzens*, 4 Cal. 381; *Battelle* v. *Connor*, 6 Cal. 140.

7. The court may extend the time for filing the statement. *Wood* v. *Fobes*, 5 Cal. 62.

8. A notice of motion for a new trial, unaccompanied by the affidavit required by statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams* v. *City of Oakland*, 8 Cal. 510.

9. An irregularity in the notice is waived by the act of filing a counter statement. *Williams* v. *Gregory*, 9 Cal. 76; *Dickinson* v. *Van Horn*, 9 Cal. 207.

10. The evidence may be simply referred to, and need not be set out in the statement on motion for a new trial. *Dickinson* v. *Van Horn*, 9 Cal. 207.

11. Where the statement embodied in the record is filed on a motion for a new trial, this appellate court will only examine the action of the court below in denying the motion. *Meerholz* v. *Sessions*, 9 Cal. 277.

(*a*) It shall be lawful for any district judge in the state, at any time within twelve months after the expiration of his term of office, or within twelve months after he shall, from any cause, have ceased to exercise the duties of his office, to sign and settle statements on motions for new trials. *Statutes of* 1859, 220.

12. The affidavits must be set forth in the record on appeal, or the party moving is deprived of all ground of error based upon them, but the omission does not affect his rights to raise the question as to errors apparent upon the face of the record. *Branger* v. *Chevalier*, 9 Cal. 353.

13. An order denying a motion for a new trial, when there is no statement settled on file, is erroneous. *Hart* v. *Burnett*, 10 Cal. 64.

14. The supreme court will not reverse an order of the court below, in granting a new trial, where there has been no abuse of the discretion of the court in granting such order. *Hanson* v. *Barnhisel*, 11 Cal. 340.

15. Where the parties in the court below stipulated that a motion for a new trial should be denied, they cannot question, in the appellate court, the correctness of an order denying such motion. *Brotherton* v. *Hart*, 11 Cal. 405.

16. A statement on new trial may be amended so as fitly to present the questions which are to be examined; if nothing additional is interposed so as to affect the merits of the motion. *Valentine* v. *Stuart*, Cal. Oct. T. 1859.

17. If a party moves for a new trial and fails, he cannot then, upon the same facts, apply to the same judge for an injunction, and re-try his case in equity. *Collins* v. *Butler*, Cal. Oct. T. 1859.

196. The application for a new trial shall be made at the earliest period practicable after filing the affidavit or statement.

See section 25, p. 15.

1. *Baldwin* v. *Kramer*, 2 Cal. 582.

2. Failure to prosecute a motion for a new trial, is a virtual abandonment of the motion. *Green* v. *Doane*, Cal. Ap. T. 1860; *Frank* v. *Doane*, ib.

CHAPTER VIII.

THE MANNER OF GIVING AND ENTERING JUDGMENT.

197. When trial by jury has been had, judgment shall be entered by the clerk, in conformity to the verdict, within twenty-four hours after the rendition of the verdict, unless the court order the case to be reserved for argument, or further consideration, or grant a stay of proceedings.

1. The district court may at any time thereafter grant relief against a judgment unjustly or improperly obtained. *Bidleman* v. *Keven*, 2 Cal. 248; *People* v. *Lafarge*, 3 Cal. 130.

2. A court may at any time render or amend a judgment *nunc pro tunc*, where the record discloses that it is incorrectly given as the judgment of the court. *Morrison* v. *Dapman*, 3 Cal. 255.

3. But if there is record evidence to show that the judgment was different from the one entered, the latter must stand until reversed. *Morrison* v. *Dapman*, 3 Cal. 255.

4. No court will be permitted, after the lapse of a term, to open a judgment upon motion to render a new judgment. Ib. See section 144.

5. A reference in the statement to the evidence as taken down by the clerk, is sufficient, if it was taken by consent and retained among the papers of the case; there is no necessity of transcribing it into the statement. *Darst* v. *Rush*, Cal. July T. 1859.

198. [1854.*] When the case is reserved for argument, or further consideration, as mentioned in the last section, it may be brought by either party before the court for argument.

199. If a counter claim, established at the trial, exceed the plaintiff's demand, so established, judgment for the defendant shall be given for the excess; or if it appear that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly.

200. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property have been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property, or the value thereof in case a return cannot be had, and damages for taking and withholding the same.

1. The damages in this case when the property has been delivered, is the legal interest on the value thereof during the detention. *Nickerson* v. *Chatterton*, 7 Cal. 568; *Douglass* v. *Kraft*, 9 Cal. 562.

2. This judgment must be in the alternative or the bond is not liable. *Chambers* v. *Waters*, 7 ib. 390; *Nickerson* v. *Chatterton*, 7 Cal. 568.

3. If the plaintiff takes the property, the defendant must claim its return in his answer, to enable the court to give the judgment in the alternative form. *Gould* v. *Scannell*, Cal. Ap. T. 1859.

201. The clerk shall keep among the records of the court, a book for the entry of judgments, to be called the "Judgment Book," in which each judgment shall be entered, and shall specify clearly the relief granted, or other determination of the action.

202. If a party die after a verdict or decision upon any issue of

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* Statutes of 1854, 84.

fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.

203. Immediately after entering the judgment, the clerk shall attach together and file the following papers, which shall constitute the judgment roll:

1st. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service, and the complaint, with a memorandum endorsed on the complaint, that the default of the defendant in not answering was entered, and a copy of the judgment.

2d. In all other cases, the summons, pleadings, and a copy of the judgment, and any orders relating to a change of the parties.

1. The mode of entering the judgment and making up and filing the judgment roll, are not to be considered imperative, but merely directory. *Stimson* v. *Huggins*, 9 How. Pr. 86.

2. It should be made to appear that the judgment has been rendered by a court which has jurisdiction of the proceedings, and when issues have been joined, that those issues have been tried in some manner prescribed by law, so as to authorize the judgment. *Thomas* v. *Tanner*, 14 ib. 426.

204. Immediately after filing a judgment roll, the clerk shall make the proper entries of the judgment, under appropriate heads, in the docket kept by him; and from the time the judgment is docketed, it shall become a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

1. The lien shall continue from the entry of the judgment for two years, and if an appeal be taken, the two years will run anew from the date of filing the remittitur. *Dewey* v. *Latson*, 6 Cal. 130.

2. The issuing and levy of an execution before the lien of the judgment upon which the execution issued expires, will not operate to prolong the lien of the judgment beyond the time limited by this section. *Isaac* v. *Swift*, 10 Cal. 71.

3. The levy and sale must both be made within the period of two years. Ib.

4. An error in the statement of date, amount, &c., which the court could amend, will not vitiate the lien of such judgment as against persons who have not been actually misled and prejudiced thereby. *Sears* v. *Burnham*, 17 New York, 445.

5. The liens of judgment creditors, if the land be sold on a prior judgment, are transferred to the surplus, which must be applied to them, in their order of priority. *Averill* v. *Loucks*, 6 Barb. 470.

6. The lien of a judgment is a question of time, depending on the day and hour when the judgment was docketed. *Blydenburgh* v. *Northrop*, 13 How. Pr. 289.

205. The docket mentioned in the last section, is a book which the clerk shall keep in his office, with each page divided into eight columns, and headed as follows: judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered. If judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order.

206. The docket kept by the clerk shall be open at all times during office hours, for the inspection of the public, without charge; and it shall be the duty of the clerk to arrange the several dockets kept by him, in such a manner as to facilitate their inspection.

207. A transcript of the original docket certified by the clerk, may be filed with the recorder of any other county, and from the time of the filing, the judgment shall become a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterwards acquire, until the said lien expires. The lien shall continue for two years, unless the judgment be previously satisfied.

See section 237.

1. To make the lien effectual, the execution must not only be issued, but the sale must take place within two years. *Little* v. *Harvey*, 9 Wend. 157; *Graff* v. *Kip*, 1 Edw. Ch. R. 619.

208. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or within one year after the judgment, by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact, otherwise than upon an execution, it shall be the duty of the party, or attorney, to give such acknowledgment, and upon motion the court may compel it, or may order the entry of satisfaction to be made without it.

TITLE VII.

OF THE EXECUTION OF THE JUDGMENT IN CIVIL ACTIONS.

CHAPTER I.

THE EXECUTION.

209. The party in whose favor judgment is given, may, at any time within five years after the entry thereof, issue a writ of execution for its enforcement, as prescribed in this chapter.

See section 214.

1. An appeal will lie from an order refusing to quash an execution. *Gilman* v. *Contra Costa county*, 8 Cal. 52.

2. The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it. *Low* v. *Henry*, 9 Cal. 538.

3. An order refusing to set aside an execution issued without leave, after five years is not appealable. The execution is not void, but only voidable in the discretion of the court from which it issued. *Bank of Genessee* v. *Spencer*, 18 N. Y. 150.

210. The writ of execution shall be issued in the name of the people, sealed with the seal of the court, and subscribed by the clerk, and shall be directed to the sheriff, and shall intelligibly refer to the judgment, stating the court, the county, where the judgment roll is filed, the names of the parties, the judgment, and if it be for money, the amount thereof, and the amount actually due thereon, and shall require the sheriff substantially as follows:

1st. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, then out of his real property; or if the judgment be a lien upon real property, then out of the real property belonging to him on the day when the judgment was docketed, or if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed

in the office of the recorder of such county, stating such day, or at any time thereafter.

2d. If it be against real or personal property, in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

3d. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor, and commit him to the jail of the county until he pay the judgment, with interest, or be discharged according to law.

4th. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the sheriff to satisfy any costs, damages, rents, or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of real property, as provided in the first subdivision of this section.

1. A sheriff cannot levy upon money in his own hands belonging to the judgment debtor, when he has received the money on an execution in favor of this debtor. *Clymer* v. *Willis*, 3 Cal. 363; *Turner* v. *Fendall*, 1 Cranch, 117; *Muscott* v. *Woolworth*, 14 How. Pr. 477.

2. The sheriff is not required absolutely to levy first on personal property; this provision is merely directory; so where the land of a defendant was mortgaged and sold under an execution, and the mortgagee failed to redeem within statute time, though the judgment debtor had ample personal property to satisfy the judgment, yet the sale will not be set aside as void, nor will the mortgagee be allowed to redeem. *Smith* v. *Randall*, 6 Cal. 47.

3. Property in the custody of the law, is not liable to seizure without an order from the court having charge thereof. *County of Yuba* v. *Adams*, 7 Cal. 35.

4. Things in action are such property as may be levied upon on execution. *Adams* v. *Hackett*, 7 Cal. 187.

5. A levy on personal property capable of manual delivery, must be made by taking the property in custody. If it is allowed to remain in the hands of the debtor, the levy cannot operate so as to defeat subsequent executions. *Dutertre* v. *Driard*, 7 Cal. 549.

6. The voluntary release of the property levied on, by the plaintiff in execution, could not revive the obligation on a mortgage given to secure the judgment. Ib.

7. A levy under an execution on property sufficient to satisfy the same, is a satisfaction of the judgment. *People* v. *Chisholm*, 8 Cal. 29.

8. A sheriff may be enjoined from selling real property belonging to the wife, under an execution against the husband. *Alverson* v. *Jones*, 10 Cal. 9.

9. A mere levy upon property sufficient to satisfy an execution will not amount to a satisfaction, although the sheriff remains in possession for a day and a half, and only abandons the levy upon the plaintiff refusing to indemnify him. *Radde* v. *Whitney*, 4 E. D. Smith, 378.

211. When a writ of execution is issued on a judgment recovered against two or more persons, in an action upon a joint contract, in which action all the defendants were not served with summons, or did not appear, it shall direct the sheriff to satisfy the judgment out of the joint property of all the defendants, and the individual property only of the defendants who were served, or who appeared in the action. In other respects, the writ shall contain the directions specified in the first subdivision of the last section.

212. The execution may be made returnable at any time, not less than ten, nor more than sixty days after its receipt by the sheriff, to the clerk with whom the judgment roll is filed.

1. Executions need not, to be valid, state the time or place of their return. *Fake* v. *Edgerton*, 5 Duer, 681.

213. Where a judgment requires the payment of money, or the delivery of real or personal property, the same shall be enforced in those respects, by execution. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced.

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214. After the lapse of five years from the entry of judgment, an execution shall be issued only by leave of the court on motion. Such leave shall not be given, unless it be established by the oath of the party or other proof, that the judgment, or some part thereof, remains unsatisfied and due.

1. This section applies only to judgments in courts of record. *White* v. *Clark*, 8 Cal. 512.

2. Where an execution has been issued within five years from the entry of judgment, the party may issue execution at any time thereafter without application to the

court. *Pierce* v. *Craine*, 4 How. Pr. 257; *McSmith* v. *Van Deusen*, 9 ib. 245: *Kress* v. *Ellis*, 14 ib. 392.

3. In this application the court will not entertain an objection to the validity of the judgment. *Lee* v. *Watkins*, 13 ib. 178.

4. A second execution cannot issue in any case without leave of the court, on notice to the defendant, after a lapse of five years. *Sacia* v. *Nestle*, 13 How. Pr. 572.

5. This provision sustained. *Hulbut* v. *Fuller*, 3 Code R. 55; *Currie* v. *Noyes*, 1 Code R., N. S., 198; *Irwin* v. *Muir*, 4 Abbott, 133.

6. Where a judgment remains unpaid more than five years, and after its recovery, the defendant obtained a discharge in insolvency which was afterwards adjudged void: held, that the plaintiff should have leave to issue execution on the judgment. *Small* v. *Wheaton*, 2 Abbott, 316.

215. Notwithstanding the death of a party after the judgment, execution thereon against his property may, upon permission granted by the probate court, be issued and executed in the same manner, and with the same effect, as if he were still living.

216. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it shall be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued, at the same time, to different counties.

217. [1854.*] All goods, chattels, moneys, and other property, real and personal, of the judgment debtor, not exempt by law, and all property and rights of property, seized and held under attachment in the action, shall be liable to execution.

Until a levy, property shall not be affected by the execution.

Shares and interests in any corporation or company, and debts and credits and other property not capable of manual delivery, may be attached on execution in like manner as upon writs of attachment.

Gold dust shall be returned by the officer as so much money collected, at its current value, without exposing the same to sale.

1. An execution affects property only from the time of levy. *Johnson* v. *Gorham*, 6 Cal. 195.

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* Statutes of 1854, 84.

2. Service of a copy of execution, and notice of garnishment upon a third party, constitutes no lien on property of the debtor in his hands. *Johnson* v. *Gorham*, 6 Cal. 195.

3. The levy on personal property must be made by taking the property into custody. *Dutertre* v. *Driard*, 7 Cal. 549.

218. If the property levied on, be claimed by a third person as his property, the sheriff shall summon from his county six persons qualified as jurors, between the parties to try the validity of the claim. He shall also give notice of the claim and of the time of trial to the plaintiff, who may appear and contest the claim before the jury. The jury and the witnesses shall be sworn by the sheriff, and if their verdict be in favor of the claimant, the sheriff may relinquish the levy, unless the judgment creditor give him a sufficient indemnity for proceeding thereon. The fees of the jury, the sheriff, and the witnesses, shall be paid by the claimant, if the verdict be against him; otherwise by the plaintiff. On the trial, the defendant and the claimant may be examined by the plaintiff as witnesses.

1. In a suit against the sheriff for not levying the execution, if the sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he tendered the bond of indemnity to the sheriff, required by law. *Strong* v. *Patterson*, 6 Cal. 156.

2. An officer taking goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, to be liable for damages. *Taylor* v. *Seymour*, 6 Cal. 512; *Daumiel* v. *Gorham*, ib. 43.

3. If several creditors levy, and those prior fail to indemnify the sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify, and incur the responsibility. *Davidson* v. *Dallas*, 8 Cal. 227.

4. The sheriff is not protected in the sale of personal property by the verdict of the jury; these proceedings are not judicial. *Perkins* v. *Thornburgh*, 10 Cal. 189.

5. A deputy took a bond running to his principal, conditioned to indemnify the latter and all persons assisting him in the premises: held, that an action lies in the name of the sheriff for the benefit of the deputy, without any assignment of the cause of action by the latter. *Stillwell* v. *Hurlbert*, 18 N. Y. 374.

6. A bond of indemnity given to the sheriff, upon execution, is not invalidated by the fact that it was given after levy and sale. *Westervelt* v. *Frost*, 1 Abbott, 74.

219. [1854.*] The following property shall be exempt from execution, except as herein otherwise specially provided (*a*).

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* Statutes of 1854, 84.

(*a*) For "Act to exempt the homestead and other property from forced sale," see *Statutes* of 1851, 296; *Wood's Digest*, 483, Art. 2580.

1. The homestead act applies to and affects property acquired previous to its passage. *Cook* v. *McChristian*, 4 Cal. 23.

1st. Chairs, tables, desks and books to the value of one hundred dollars, belonging to the judgment debtor.

2d. Necessary household, table and kitchen furniture belonging to the judgment debtor, including stove, stove-pipe, and stove furniture,

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2. A notice of homestead is not required to be filed in the county recorder's office. *Cook* v. *McChristian*, 4 Cal. 23.

3. The homestead is the dwelling place of the family, where they permanently reside, and that residence gives notice to every one of the character of the occupants' claim. Ib; *Taylor* v. *Hargous*, ib. 268; *Holden* v. *Pinney*, 6 Cal. 234.

4. The fact of occupancy as a homestead was properly submitted to a jury. *Cook* v. *McChristian*, 4 Cal. 23.

5. The purchaser of a homestead from the husband without the concurrence of the wife, is not entitled to recover the excess of value over $5000. Ib; *Moss* v. *Warner*, 10 Cal. 296.

6. The removal of the husband and wife from a homestead thus selected, after and in consequence of sale and conveyance by the husband, in which the wife did not join, furnishes no evidence of an abandonment of the homestead by her, but seems to be the very case against which the statute intended to provide. *Taylor* v. *Hargous*, 4 Cal. 268; *Holden* v. *Pinney*, 6 Cal. 234; *Moss* v. *Warner*, 10 Cal. 296; overruled in *Harper* v. *Forbes*, Cal. Jan. T. 1860.

7. It becomes a sort of joint tenancy, with the right of survivorship, as between husband and wife, and this estate cannot be altered or destroyed, except by the concurrence of both, in the manner provided by law, unless it be in favor of an innocent purchaser without notice. *Taylor* v. *Hargous*, 4 Cal. 268; *Ex parte Tompkins*, 12 Cal. 114; overruled in *Gee* v. *Moore*, Cal. Oct. T. 1859, and *Harper* v. *Forbes*, Jan. T. 1860.

8. In the case of the successive occupancy of several places as residences, the recovery of any one of them by the wife, as a homestead, would bar her recovery of any other as such. *Taylor* v. *Hargous*, 4 Cal. 268.

9. Homesteads cannot be carved out of land held in joint tenancy, or by tenancy in common, as the law has provided no mode for their separation and ascertainment. *Wolf* v. *Fleischacker*, 5 Cal. 244; *Reynolds* v. *Pixley*, 6 ib. 165; *Giblin* v. *Jordan*, ib. 416.

10. B bought the premises in controversy, and executed a mortgage in part payment, which was transferred to the plaintiff. Plaintiff then loaned B a further sum, cancelled the first mortgage and took another mortgage on the same lot, with another: held, the land could not be claimed as a homestead, and was liable for the remainder of the purchase money. *Dillon* v. *Byrne*, 5 Cal. 455; *Swift* v. *Kraemer*, Cal. April T. 1859.

11. The homestead is only liable for the remainder of the purchase money with the interest unpaid. *Dillon* v. *Byrne*, 5 Cal. 455.

12. A sale or alienation of the homestead property without the signature of the wife is void only as to the homestead value of $5000. *Sargent* v. *Wilson*, ib. 504.

wearing apparel, beds, bedding and bedsteads, and provisions actually provided for individual or family use, sufficient for one month.

3d. The farming utensils or implements of husbandry of the judgment debtor, also two oxen, or two horses, or two mules and their har-

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13. In an action to foreclose a mortgage upon property claimed as a homestead, the wife should be allowed to intervene. *Sargent* v. *Wilson*, 5 Cal. 504.

14. To make a valid sale of the homestead requires the joint deed of the husband and wife; separate deeds are both invalid. *Poole* v. *Gerrard*, 6 Cal. 71; *Dunn* v. *Toner*, 10 ib. 167.

15. A wife cannot sue alone to recover the estate; both husband and wife must join in the action. *Cook* v. *Klink*, 8 Cal. 347; *Poole* v. *Gerrard*, 6 Cal. 71.

16. After a partition of property held in joint tenancy, there must be overt acts of dedication of the separate property, to create the right of homestead. *Reynolds* v. *Pixley*, 6 Cal. 165.

17. The question of homestead is a question of fact; and the presumption arising from residence may be defeated by facts and circumstances aliunde. *Holden* v. *Pinney*, ib. 234.

18. The sheriff should not sell under execution a house claimed as a homestead, and worth more than $5000, until an exact appraisement of the premises is had, so that the sheriff can convey a definite fractional undivided interest therein. *Gary* v. *Eastabrook*, 6 Cal. 457.

19. The interest conveyed otherwise will be undefined and uncertain, and upon which the purchaser cannot maintain an action for possession and mesne profits. Ib.

20. A husband and wife may destroy a homestead right by selling the whole of the property, or by selling an undivided interest therein. *Kellersberger* v. *Kopp*, 6 Cal. 563.

21. If the family did not reside upon the premises prior to the giving of a mortgage thereupon, by the husband, the character of homestead did not become impressed upon the premises, and the homestead exemption cannot be maintained against the mortgage. *Cary* v. *Tice*, 6 Cal. 625.

22. Our legislature has a constitutional power to declare how a homestead can be sold at forced sale. The constitution is inoperative in itself, and looks to legislation, and it was entirely within the discretion of the legislature to determine how far and in what manner the homestead should be protected. Ib; *Pfeiffer* v. *Rhein*, Cal. July T. 1859.

23. Where the wife did not reside in California, the law will not construe her domicil to be with the husband in California, to maintain a right of homestead against a mortgage given before her arrival and residence on the premises. Ib.; 2 *Benedict* v. *Bunnell*, 7 Cal. 245; *Rix* v. *McHenry*, ib. 89.

24. A, a married man, mortgaged the homestead to B without the concurrence of his wife. Subsequently A and his wife mortgaged the homestead to C: held, that C could urge the same objections to the mortgage of B that A and his wife could, and

ness, two cows and one cart or wagon, and food for such oxen, horses, cows or mules, for one month.

4th. The tools and implements of a mechanic necessary to carry on his trade, the instruments and chests of a surgeon, physician, surveyor

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that the mortgage to B was invalid, if the premises were worth less than $5000. *Dorsey* v. *McFarland*, 7 Cal. 342; *Van Reynigom* v. *Revalk*, 8 ib. 75.

25. The separate property of the husband acquired before marriage may become the homestead, as well as the common property of the husband and wife. *Revalk* v. *Kraemer*, 8 Cal. 66.

26. Legal proceedings, to be conclusive against either husband or wife, as to their right of homestead, must embrace both. Ib.; *Marks* v. *Marsh*, 9 Cal. 96.

27. Where the wife died, leaving no children, the right of homestead ceased, as the husband ceased to be the head of a family; but a prior mortgage by the husband alone being originally void as to the homestead, is not made valid by the death of the wife, and the mortgagee stands in the same position as any other creditor. *Revalk* v. *Kraemer*, 8 Cal. 66; overruled in *Gee* v. *Moore*, Cal. Oct. T. 1859.

28. The husband alone being defendant, cannot appeal, the question of homestead not being properly in the case. *Revalk* v. *Kraemer*, 8 Cal. 74.

29. Where A and wife conclude to purchase premises of B, and for that purpose borrowed money of C, and executed a mortgage to him by the husband alone, the homestead right will be forfeited under the mortgage. *Lasson* v. *Vance*, ib. 271.

30. The homestead right is not affected by the foreclosure of a mortgage executed by the husband alone. *Cook* v. *Klink*, ib. 347.

31. Where the husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser, and the money therefor is fraudulently attached before paid over, equity will compel a cancellation of the deed. *Still* v. *Saunders*, 8 Cal. 281.

32. The homestead right cannot be tried on a motion to set aside a sale under the mortgage. The husband and wife should have filed a cross bill in the foreclosure suit, or brought an ejectment suit for the property. *Cook* v. *Klink*, ib. 347.

33. The homestead being held in a sort of joint tenancy, passes, on the death of the husband to the wife, by right of survivorship, and forms no part of the common property. *Ex parte Buchanan's estate*, 8 Cal. 507; *Dunn* v. *Tozer*, 10 ib. 167.

34. In an action in which a homestead right is asserted, in which an issue of fact is made as to the marriage of parties, the declarations of the alleged wife to the effect that she is not married, are admissible in evidence. *Poole* v. *Gerrard*, 9 ib. 593.

35. If the property is a homestead, no damage can result from a sale thereof by a sheriff on an execution against the husband, as his deed conveys nothing. *Kendall* v. *Clark*, 10 ib. 17; contra, *Dunn* v. *Tozer*, ib. 167.

36. The fact that both husband and wife were anxious to sell their homestead, and the husband made repeated efforts for that purpose, but failed because a satisfactory price could not be obtained, does not show an intention to abandon the homestead as such. *Dunn* v. *Tozer*, 10 Cal. 167.

and dentist, necessary to the exercise of their profession, with the professional library, and the law libraries of an attorney or counselor.

5th. The tent and furniture, including a table, camp stools, bed and bedding of a miner; also, his rocker, shovels, spades, wheelbarrows,

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37. The declaration of intention to sell and remove from the premises will not constitute abandonment. *Dunn* v. *Tozer*, 10 Cal. 167.

38. In an action for divorce, a homestead cannot be claimed where it is not shown that the property claimed has been at any time, during the existence of the marriage, the residence of the family. *Elmore* v. *Elmore*, 10 Cal. 224.

39. The residence of the husband with his family upon the premises, impresses upon them the character of homestead. *Moss* v. *Warner*, Ib. 296.

40. When a mortgage is given as security for the purchase money of the mortgaged premises, no homestead can be carved out of the property so as to impair the rights of the mortgagee. *McDonald* v. *Maddux*, 11 Cal. 190.

41. A homestead right cannot be asserted merely to a building, independent of the land upon which the building is erected. *Smith* v. *Smith*, 12 ib. 217.

42. A mortgage of the homestead, executed by the husband alone, is void. To make such a mortgage valid, the wife should join in the execution. *Lies* v. *DeDiablar*, ib. 327.

43. Although the wife may have a claim of homestead in the premises, for nonjoinder in the deed, yet, after her death, the right is gone, and does not rest in the husband, nor will her death, during the pending of the suit, alter the rule. *Gee* v. *Moore*, Cal. Oct. T. 1859.

44. There is nothing in the nature of the homestead right or privilege, which justifies its designation as a joint tenancy with right of survivorship, although it has been formerly so held by this court. Ib.

45. The statute confers no right upon the wife to the homestead independent of the husband, which she can enforce against his consent. It affords protection to him, and only through him, to the wife and children. *Guiod* v. *Gourdon*, Cal. Jan. T. 1860.

46. So long as the premises retain the character of homestead, the conveyance of the husband, without the signature and acknowledgment of the wife, is invalid so as to entitle the grantee to their possession, but no longer. Ib.

47. If the premises were abandoned in fact, with no intention on the part of the head of the family to re-occupy them as a homestead at the date of the conveyance, the entire estate passed to the grantee absolutely; but if not thus abandoned, if the removal was temporary in its nature, made for a specific purpose, the premises remained subject to *his* right to claim their enjoyment and use as such homestead. Ib.

48. Removal from premises occupied as a homestead by the husband, with his family, is presumptive evidence of their abandonment of the homestead, and this presumption must be rebutted by parties who assert a claim to the premises. *Harper* v. *Forbes*, Cal. Jan. T. 1860.

pumps and other instruments used in mining, with provisions necessary for his support for one month.

6th. Two oxen, or two horses, or two mules, and their harness, and one cart or wagon, by the use of which a cartman, teamster, or other laborer habitually earns his living; and food for such oxen, horses or mules for one month; and a horse, harness and vehicle used by a physician or surgeon in making his professional visits.

7th. All fire engines, with the carts, buckets, hose and apparatus thereto appertaining, of any fire company or department organized under any law of this state.

8th. All arms and accoutrements required by law to be kept by any person. But no article mentioned in this section shall be exempt from execution issued on a judgment recovered for its price, or upon a mortgage thereon.

9th. All court houses, jails, public offices and buildings, lots, grounds, and personal property belonging to any county of this state, and all cemeteries, public squares, parks and places, public buildings, town halls, markets, buildings appertaining to the fire departments, and the lots and grounds thereunto belonging and appertaining, owned or held by any town or incorporated city, or dedicated by such town or city to health, ornament or public use.

1. 2d. It would be a very narrow construction of the statute, to limit the exemption of household furniture to the number of articles required for immediate and constant use. *Haswell* v. *Parsons*, Cal. Jan. T. 1860.

2. 6th. A hackney coach is not exempt. *Quigley* v. *Gorham*, 5 Cal. 418.

3. A ferry license, being a franchise, is not the subject of levy and sale under execution. *Thomas* v. *Armstrong*, 7 ib. 286.

4. A mining claim is not exempt from forced sale. *McKeon* v. *Bisbee*, 9 ib. 137.

5. When two mules are claimed as exempt, it must be shown by the claimant that he habitually earned his living by the use of the animals, or that he is one of the persons mentioned in the statute. *Calhoun* v. *Knight*, 10 ib. 393.

6. A cartman's horse, harness and cart are exempt. *Harthouse* v. *Rikers*, 1 Duer, 606.

7. 9th. A levy upon the county revenues in the hands of the treasurer, was illegal and void. These funds are authorized by law, and appropriated to distinct purposes, and are not subject to seizure upon execution. *Gillman* v. *Contra Costa county*, 8 Cal. 52.

8. The judgment debtor need not have the right of property in the thing exempt. If he is only a part owner, he is within the meaning and object of the statute. *Radcliff v. Wood*, 25 Barb. 52.

220. The sheriff shall execute the writ against the property of the

judgment debtor, by levying on a sufficient amount of property, if there be sufficient; collecting or selling the things in action, and selling the other property, and paying to the plaintiff or his attorney, so much of the proceeds as will satisfy the judgment, or depositing the amount with the clerk of the court; any excess in the proceeds over the judgment and the sheriff's fees, shall be returned to the judgment debtor. When there is more property of the judgment debtor than is sufficient to satisfy the judgment and the sheriff's fees, within the view of the sheriff, he shall levy only on such part of the property as the judgment debtor may indicate: provided, that the judgment debtor be present at, and indicate at the time of the levy, such part; and provided, that the property indicated be amply sufficient to satisfy such judgment and fees.

1. This was evidently enacted for the benefit of the debtor. *Smith* v. *Randall*, 6 Cal. 47.

2. A sale under a void judgment passes no title. If the judgment is merely voidable, the sale is good. *Gray* v. *Hawes*, 8 ib. 562.

3. Where an execution on a judgment for the recovery of money is not stayed on appeal, a sale may be made on the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer* v. *Rogers*, 10 ib. 335.

4. Where the execution debtor owns property jointly with another, a sheriff, who has such execution, has the right to levy on such property and take it into possession for the purpose of subjecting it to sale. *Waldman* v. *Broder*, ib. 378.

5. The private property of an inhabitant of a county, is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. *Emeric* v. *Gilman*, ib. 404.

6. No execution can issue upon a judgment rendered against a county. Ib.

7. An execution must be warranted by the judgment. If it exceeds the judgment, it has no validity. *Davis* v. *Robinson*, ib. 411.

8. The interest of one partner in the partnership chattels, is the subject of levy and sale by the sheriff, on an execution against one of the partners. *Jones* v. *Thompson*, 12 ib. 121.

9. A sheriff, upon whom a fine had been imposed by the court to the amount of an execution issued to him, for willful neglect of his duty in regard to it, and who, pursuant to the order of the court, has paid the fine to the judgment creditor, has no authority to enforce the execution against the debtor for his own indemnity. Nor has he authority to do so where the amount of the fine was paid with his moneys by a third person, and the judgment assigned to such third person to be held for the sheriff's benefit. An officer cannot execute final process in his own favor, or for his own benefit. *Carpenter* v. *Stilwell*, 1 Kern. 61.

10. In selling property under an execution, a sheriff acts by virtue of a power; if that power does not exist, no title passes. *Carpenter* v. *Stilwell*, 1 Kern. 61.

11. To enable a sheriff to receive per centage, the property must be sold. *Hoge* v. *Page*, 11 How. Pr. 207.

221. Before the sale of property on execution, notice thereof shall be given as follows:

1st. In case of perishable property, by posting written notice of the time and place of sale, in three public places of the township or city where the sale is to take place, for such a time as may be reasonable, considering the character and condition of the property.

2d. In case of other personal property, by posting a similar notice in three public places of the township or city where the sale is to take place, not less than five nor more than ten days successively.

3d. In case of real property, by posting a similar notice, particularly describing the property, for twenty days successively, in three public places of the township or city where the property is situated, and also where the property is to be sold; and publishing a copy thereof once a week, for the same period, in a newspaper in the county, if there be one.

See section 654.

1. Although the officer neglect to give the notice, the sale shall not be void. *Smith* v. *Randall*, 6 Cal. 47; *Harvey* v. *Fisk*, 8 ib. 93.

222. An officer selling without the notice prescribed by the last section, shall forfeit five hundred dollars to the aggrieved party, in addition to his actual damages; and a person willfully taking down or defacing the notice posted, if done before the sale or the satisfaction of the judgment, (if the judgment be satisfied before sale) shall forfeit five hundred dollars.

223. All sales of property under execution shall be made at auction to the highest bidder, and shall be made between the hours of nine in the morning, and five in the afternoon; after sufficient property has been sold to satisfy the execution, no more shall be sold. Neither the officer holding the execution, nor his deputy, shall become a purchaser, or be interested in any purchase at such sale. When the sale is of personal property, capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely

to bring the highest price; and when the sale is of real property, and consisting of several known lots or parcels, they shall be sold separately; or when a portion of such real property is claimed by a third person, and he requires it to be sold separately, such portion shall be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold, when such property consists of several known lots or parcels, or of articles which can be sold to advantage separately; and the sheriff shall be bound to follow such directions.

1. A sheriff's deputy may execute a deed for property sold under execution, but he must execute it in the name of the sheriff. If executed in his own name, it is decisive against the party claiming under it. *Lewes* v. *Thompson*, 3 Cal. 266.

2. The statute regulating sheriff's sales of real estate, does not design to invest a purchaser with the title until six months after the sale. *Duprey* v. *Moran*, 4 ib. 196.

3. A purchaser at sheriff's sale acquires no right whatever against the sheriff for property sold, unless at the time of the sale he pays down in cash the whole amount of the purchase money. *People* v. *Hays*, 5 ib. 66.

4. Notice of a motion to set aside an execution and a levy made thereunder, will not operate as a stay of proceedings, and where third parties have purchased at an execution sale, it is too late to move to set aside the execution. *Bryan* v. *Berry*, 8 ib. 130.

5. The rules of equity proceedings require, in such cases, not only that the property should be sold in parcels, but that property included in a first mortgage should be exhausted before recourse is had to a second, in order that the amount of redemption may be accurately ascertained. *Raun* v. *Reynolds*, 11 ib. 14.

6. The provisions for the sale of land of known lots or parcels, to be made separately and not in gross, is only directory. It is not a void sale if made in gross, but only voidable at the instance of the aggrieved party. *Cunningham* v. *Cassidy*, 17 New York, 276.

7. The sale of separate parcels of land together as one parcel, is always sufficient cause for setting aside the sale. *Ames* v. *Lockwood*, 13 How. Pr. 555.

8. Under what circumstances and on what terms a re-sale of property sold at a judicial sale will be ordered. *Stahl* v. *Charles*, 5 Abbott, 348.

224. If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property at any time, to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, by motion upon previous notice of five days before any court, or before any justice of the peace, if the same shall not exceed his jurisdiction.

1. Actual evidence of fraud may be shown in defense when the party did not know

the condition of the thing purchased, and was induced to buy upon the faith of representations made by those who, by their peculiar relations to the subject, were supposed to be thoroughly acquainted with it. *Webster* v. *Haworth*, 8 Cal. 21.

2. Where a party purchased real estate, at an execution sale, upon the faith of the representations of the judgment creditor, that his judgment was the first on the property, when, in fact, there were prior incumbrances on it of more than its value: held, that the purchaser should be relieved, and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff. Ib.

3. This provision of law will be enforced, unless fraud is proven between the officer and the second purchaser. *Harvey* v. *Fisk*, ib. 93.

4. The auctioneer may put up the property for sale again if the purchaser does not comply with the terms of the sale, but this must be on such notice that no one will be misled by it. *Lentz* v. *Craig*, 2 Abbott, 294.

5. Inadequacy of price, as would amount to fraud, will authorize a re-sale. *King* v. *Morris*, ib. 296.

225. Such court or justice shall proceed in a summary manner and give judgment and issue execution therefor forthwith, but the defendant may claim a jury. And the same proceedings may be had against any subsequent purchaser who shall refuse to pay, and the officer may, in his discretion, thereafter reject the bid of any person so refusing.

226. The two preceding sections shall not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser, and the amount collected from the purchaser refusing to pay.

227. When the purchaser of any personal property capable of manual delivery shall pay the purchase money, the officer making the sale shall deliver to the purchaser the property, and if desired shall execute and deliver to him a certificate of the sale and payment. Such certificate shall convey to the purchaser all the right, title and interest which the debtor had in and to such property on the day the execution was levied.

228. When the purchaser of any personal property not capable of manual delivery shall pay the purchase money, the officer making the sale shall execute and deliver to the purchaser a certificate of sale

and payment. Such certificate shall convey to the purchaser all right, title and interest which the debtor had in and to such property on the day the execution was levied.

1. The word "officer," in the two previous sections, refers to the incumbent at the time of the act of sale, and if he be dead, his successor cannot perform the duty. *People* v. *Boring*, 8 Cal. 406.

2. How the act is to be done in such a case, discussed and suggested. Ib.

229. Upon a sale of real property, when the estate is less than a leasehold of two years' unexpired term, the sale shall be absolute. In all other cases the real property sold shall be subject to redemption, as provided in this chapter. The officer shall give to the purchaser a certificate of the sale, containing:

1st. A particular description of the real property sold;

2d. The price bid for each distinct lot or parcel;

3d. The whole price paid.

4th. When subject to redemption it shall be so stated, a duplicate of which certificate shall be filed by the officer with the recorder of the county.

1. The title of a purchaser of real estate, at sheriff's sale, does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud* v. *El Dorado county*, 12 Cal. 128.

230. Property sold subject to redemption, as provided in the last section, or any part sold separately, may be redeemed in the manner hereinafter provided, by the following persons, or their successors in interest:

1st. The judgment debtor, or his successor in interest in the whole or any part of the property;

2d. A creditor, having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section, are, in this chapter, termed redemptioners.

1. A subsequent judgment creditor, having a lien, has a right to redeem real estate, sold by foreclosure of a previous mortgage, in the hands of the purchaser. *Kent* v. *Laffan*, 2 Cal. 595; *Guy* v. *Middleton*, 5 ib. 392; *Harlan* v. *Smith*, 6 ib. 173; *McMillan* v. *Richards*, 9 ib. 365.

2. The redemption should be beneficially construed. *Kent* v. *Laffan*, 2 ib. 595.

3. A party, (the assignee of the judgment debtor) is bound to pay the whole of the

plaintiff's judgment in order to redeem, and not merely his bid with interest. The lien of the judgment continues till the balance is paid. *Vandyke* v. *Herman*, 3 Cal. 295.

4. Upon the redemption, the redeeming party has a right to an assignment of the mortgage redeemed, and, if it be recorded, a right to require the mortgagee to acknowledge the assignment. *Averill* v. *Taylor*, 4 Seld. 44.

5. A redemption of land may be made at any time before the close of the last day allowed by law for the purpose; business hours are not regarded in this respect. *People* v. *Perrin*, 1 How. Pr. 75.

6. This title to real estate does not pass until the execution and delivery of the deed. *Anthony* v. *Wessel*, 9 Cal. 103.

231. [1859, 1860.*] The judgment debtor, or redemptioner, may redeem the property from the purchaser within six months after the sale, on paying the purchaser the amount of his purchase, with *twelve* per cent. thereon in addition, together with the amount of any assessment or taxes which the purchaser may have paid thereon after the purchase, and interest on such amount; and if the purchaser be also a creditor, having a prior lien to that of the redemptioner, *other than the judgment under which such purchase was made*, the amount of such lien with interest.

1. Where land was sold at sheriff's sale, the proceeds of which did not amount to the whole judgment, leaving a balance unpaid, and was afterwards redeemed under the statute, held, that the party redeeming, (who was an assignee of the judgment debtor) was bound to pay the whole of the plaintiff's judgment, and not merely his bid with interest, and eighteen per cent., and that the lien of the judgment continued until the balance was paid. *Vandyke* v. *Herman*, 3 Cal. 295: *Knight* v. *Fair*, 9 ib. 117; *McMillan* v. *Richards*, ib. 365. (The amendments of 1860 overrule these decisions in part.)

2. When property was sold under judgment, prior to the passage of the act providing for redemption, there is no right of redemption. *People* v. *Hays*, 4 ib. 127; *Seale* v. *Mitchell*, 5 ib. 401.

3. The purchaser may have a lien upon the property prior to that of the redemptioner, and that lien must be paid. *Knight* v. *Fair*, 9 ib. 117.

4. The sheriff acts as the agent of the redemptioner and the redemptionee both, and if the redemptioner pays more than is required, he can recover it back of the sheriff. *McMillan* v. *Vischer*, Cal. Oct. T. 1859.

5. The per centage in addition is intended to cover the whole amount of interest, and there is no pretext for adding interest on the bid of the purchaser. Ib.

6. A redemption may be a contract like all other contracts, but it must depend upon the law for its validity. The law in existence at the time of the contract is the law

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* Statutes of 1860, 000.

governing the contract. Redemption is a new and extraordinary privilege given by statute. *Tuolumne Redemption Co.* v. *Sedgwick*, Cal. April T. 1860.

7. If the redemptioncr purchases judgments after the act, and the statute does not give to the assignee of them the privilege of holding the amount of these judgments as a portion of the sum to be paid in order to affect a redemption by a subsequent redemptioner, he cannot of course complain. Ib.

8. The redemption money must be paid to the properly authorized person or officer. *Griffin* v. *Chase*, 23 Barb. 278.

9. A junior incumbrancer is entitled to redeem a prior mortgage, and is entitled to a subrogation of the rights of the senior mortgagee. *Jenkins* v. *Continental Insurance Co.*, 12 How. Pr. 66.

232. [1859, 1860.*] *If property be so redeemed by a redemptioner, either the judgment debtor or another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner on paying the sum paid on such last redemption with four per cent. thereon in addition, and the amount of any assessment or taxes which the said last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition, the amount of any liens held by said last redemptioner prior to his own, with interest; provided, that the judgment under which the property was sold need not be paid as a lien. The property may be again, and as often as the debtor or a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption, with four per cent. thereon in addition, and the amount of any assessments or taxes which the last previous redemptioner paid after the redemption by him, with interest thereon, and the amount of any liens, other than the judgment under which the property was sold, held by the said last redemptioner previous to his own, with interest. Notice of redemption shall be given to the sheriff. If no redemption be make within six months after the sale, the purchaser, or his assignee, shall be entitled to a conveyance; or if so redeemed, whenever sixty days have elapsed, and no other redemption has been made, and notice thereof given, the time for redemption shall have expired, and the last redemptioner, or his assignee, shall be entitled to a sheriff's deed. If the debtor redeem at any time before the time for the redemption expires, the effect of the sale shall be terminated and he be restored to his estate.*

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1. A sheriff's deputy may execute a deed for propery sold under execution, but he must execute it in the name of the sheriff. If executed in his own name, it is decisive against the party claiming under it. *Lewes* v. *Thompson*, 3 Cal. 266.

2. A mandamus will not lie against a sheriff, to compel him to make a deed to land to a purchaser at execution sale who refuses to pay the purchase money, for the reason that he is the oldest judgment and execution creditor, and entitled to the money; especially when there is an unsettled contest as to the question of lien. *Williams* v. *Smith*, 6 ib. 91.

3. Where a sheriff's deed is executed by a deputy in the name of the sheriff whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown, to authorize such deed to be read in evidence in an action of ejectment. *Cloud* v. *El Dorado county*, 12 ib. 128.

4. Under what circumstances and upon what terms a re-sale of property sold at a judicial sale will be ordered. *Lentz* v. *Craig*, 2 Abbott, 294; *King* v. *Morris*, ib. 296; *Merchant's Insurance Co.* v. *Hinman*, 3 ib. 455.

233. The payment mentioned in the last two sections may be made to the purchaser or redemptioner, as the case may be, or for him, to the officer who made the sale; and a tender of the money shall be equivalent to payment.

1. A payment to the sheriff for the redemption of land sold under execution, cannot be made in certified checks. *People* v. *Hays*, 4 Cal. 127.

2. The "officer who made the sale" refers to the incumbent at the time of the act of sale, and not to the official character of the person, and if he be dead, his successor cannot perform the duty, *i. e.*, receive the redemption money. *People* v. *Boring*, 8 ib. 406; *Anthony* v. *Wessel*, 9 ib. 103.

3. How redemption money in such cases is to be paid, discussed and suggested. *People* v. *Boring*, 406.

4. A creditor paid, unconditionally, to the sheriff the requisite amount for redemption, and immediately thereafter served an injunction in his own favor, restraining the sheriff from paying it over; it was held, nevertheless, that he was entitled to a sheriff's deed. *McMillan* v. *Richards*, 9 ib. 365; *Ex parte Newell*, 4 Hill, 589.

5. The title to redeem does not arise from the existence of the facts mentioned in the statute, but it is a statutory right, given only in the event of a tender and production of certain statutory proofs. The redemptioner must produce a copy of the docket of the judgment; a copy of the judgment is not sufficient. *Haskell* v. *Manlove*, Cal. July T. 1859.

234. A redemptioner shall produce to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff;

1st. A copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court, or of the county where the judgment is docketed; or if he redeem upon a mortgage or other lien, a note of the record thereof certified by the recorder;

2d. A copy of any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto; and,

3d. An affidavit by himself, or his agent, showing the amount then actually due on the lien.

235. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it shall not be deemed waste for the person in possession of the property at the time of sale, or entitled to possession afterwards, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used; or to use in the ordinary course of husbandry; or to make the necessary repairs of buildings thereon; or to use wood or timber on the property therefor; or for the repair of fences; or for fuel in his family while he occupies the property.

1. A purchaser under sheriff's sale has no right to the possession of the premises until the expiration of the time allowed for redemption. *Guy* v. *Middleton*, 5 Cal. 392.

236. The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, shall be entitled to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof.

1. A purchaser of land at sheriff's sale, can maintain an action for rent against the tenant in possession under the judgment debtor, before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the terms of the lease existing when he purchased. The sale operates as an assignment of the lease for the time. *Reynolds* v. *Lathrop*, 7 Cal. 43.

2. As to whether the words "tenant in possession" would include the judgment debtor in a case where he was in possession at the time of the sale, so as to make him responsible for use and occupation, *quære?* Ib.

3. After sale, and before the term of redemption has expired, the purchaser is entitled to collect the rents. *McDevitt* v. *Sullivan*, 8 Cal. 592.

4. The phrase "the tenant in possession" is a generic term, intended to designate the class of persons from whom the purchaser was to receive the rents. The phraseology designed evidently to fix a general right applying to all cases of tenancy, for none are excluded. It embraces, within the natural and usual meaning of the words, a judgment debtor as well as his lessee. *Harris* v. *Reynolds*, Cal. April T. 1859.

237. [1860.*] *If the purchaser of real property, sold on execution, or his successor in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor. If the purchaser of property at sheriff's sale, or his successor in interest, fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest, or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon, from the time of payment, at the same rate that the original judgment bore; and when so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, and bearing interest as aforesaid, and any other or after acquired property, rents, issues or profits, of the said debtor shall be liable to levy and sale under execution in satisfaction of such debt; provided, that no property of such debtor sold bona fide before the filing of such petition, shall be subject to the lien of said judgment; and provided, further, that notice of the filing of such petition shall be made by filing a notice thereof, in the recorder's office of the county where such property may be situated; and that said judgment shall be revived in the name of the original plaintiff or plaintiffs, for the use of said petitioner, the party in interest.*

CHAPTER II.

PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

238. When an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides; or if he do not reside in this state, to the sheriff of the county where the judgment roll is filed; is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, shall be entitled to an order from a

* Statutes of 1860, 000.

judge of the court, or a county judge, requiring such judgment debtor to appear and answer concerning his property, before such judge, or a referee appointed by him, at a time and place specified in the order; but no judgment debtor shall be required to attend before a judge or referee out of the county in which he resides, when proceedings are taken under the provisions of this chapter.

1. These proceedings are a substitute for a creditor's bill in the old practice. *Adams* v. *Hackett*, 7 Cal. 187.

2. The judgment debtor may be cross-examined. *Leroy* v. *Halsey*, 1 Duer, 589.

3. A person examined as a witness before a referee, in a proceeding supplementary to execution, is entitled to fees as a witness. *Davis* v. *Turner*, 4 How. Pr. 190.

4. A person not a party to the judgments may be made a party to supplementary proceedings. Ib.

5. A party examined is not entitled to a cross-examination, but he may have the advice and instruction of counsel in forming his answers. It is in the discretion of the court to direct the property of the judgment debtor to be applied to the satisfaction of the judgment. *Corning* v. *Tooker*, 5 ib. 16.

6. These provisions are not applicable to judgments against corporations. *Hinds* v. *Canandaigua R. R. Co.*, 10 ib. 487; *Sherwood* v. *Buffalo R. R. Co.*, 12 ib. 136.

7. The judge has no authority under these proceedings to issue a commission to examine witnesses abroad. *Graham* v. *Colburn*, 14 ib. 52.

8. The legal remedy by execution must have been fully and really exhausted before the order can issue. *Pudney* v. *Griffiths*, 15 ib. 411.

9. On the return of an order for an examination, the order may be dismissed on defendant's motion, if it appear to have been improvidently granted. *Curtois* v. *Harrison*, 3 Abbott, 96.

10. A judgment debtor who appears pursuant to an order, and without objection submits to an examination, and omits to appeal from a subsequent order appointing a receiver, waives objection to the jurisdiction of the judge to take the examination and make the order. *Vilburt* v. *Frost*, ib. 119.

239. [1854.*] After the issuing an execution against property, and upon proof by affidavit of a party, or otherwise, to the satisfaction of the court or of a judge thereof, or county judge, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge, or a referee appointed by him, to answer concern-

* Statutes of 1854, 84.

ing the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment, as are provided upon the return of an execution. Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking with sufficient surety, that he will attend from time to time before the judge or referee, as shall be directed, during the pendency of proceedings, and until the final determination thereof, and will not in the mean time dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.

1. If the referee be the clerk of the attaching creditor, it is not an evidence of fraud. *Adams* v. *Hackett*, 7 Cal. 187.

2. When the plaintiff examined the judgment debtor as to a judgment held by him against A, and afterwards obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A a party to the proceeding. Ib.

3. Where, on examination of a judgment debtor, it appears that he is in possession avowedly as the agent of a third person, of property claimed by such person under a paper title apparently good, it is improper to order a delivery of the property to the receiver. The proper remedy is for the receiver to bring an action against the claimant, to test the question of ownership. *Rodman* v. *Henry*, 17 New York, 482.

4. The affidavit, if not made by the judgment creditor, and does not state that the person making it was his agent or had any interest in the judgment, or any authority whatever, will not support the order, although the deponent was the owner of the judgment. *Lindsay* v. *Sherman*, 5 How. Pr. 308.

5. These proceedings may be commenced upon the proper return of the execution at any time within the time prescribed for the return. *Livingston* v. *Cleaveland*, ib. 396.

6. There must be an execution issued and the same returned unsatisfied, previous to the issuance of this order. *Sackett* v. *Newton*, 10 ib. 560.

7. It is not necessary that the debtor himself should be examined on oath, concerning his property. *Graves* v. *Lake*, 12 ib. 33.

8. This order may issue after five years from the entry of the judgment. *Miller* v. *Rossman*, 15 ib. 10.

9. The assignee of a judgment may institute supplementary proceedings under the code, although the party applying became the assignee of the judgment after the execution was returned unsatisfied. *Ex parte Orr*, 2 Abbott, 457.

10. After an examination of judgment debtor had before a referee, has been once completed and closed, it cannot be re-opened except upon special order for that purpose. Ib.

11. After a judgment creditor has had one complete examination of his debtor, he cannot institute a new examination as if it were the first, but must apply on notice and affidavits, showing a special reason why a new examination should be had, for an order for that purpose. *Ex parte Orr*, 2 Abbott, 457.

12. A witness examined on supplementary proceedings respecting property of the judgment debtor, is bound to answer all such questions as may be put concerning such property. He is not to be excused from answering because he sets up a claim to the property which is the subject of examination. *Sandford* v. *Carr*, 2 Abbott, 462.

240. After the issuing of an execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge for the amount so paid.

1. The issuing of a second execution is not waiver of supplementary proceedings commenced after the return of the first execution. *Lilliendahl* v. *Fellerman*, 11 How. Pr. 528.

241. After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear at a specified time and place, before him, or a referee appointed by him, and answer concerning the same.

1. If it appears on examination of witnesses that a third person, not a party to the proceeding, is in possession of property liable to an execution, belonging to a judgment debtor, the proper remedy is to levy on the goods and sell them, or to institute an action in the nature of a creditor's bill against the debtor and his fraudulent assignee. *Dorr* v. *Noxon*, 5 How. Pr. 29.

242. Witnesses may be required to appear and testify before the judge, or referee, upon any proceeding under this chapter, in the same manner as upon the trial of an issue.

243. The judge or referee may order any property of the judgment debtor, not exempt from execution, in the hands of such debtor or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment; except that the earnings of

the debtor for his personal services, at any time within thirty days next preceding the order, shall not be so applied, when it shall be made to appear by the debtor's affidavit, or otherwise, that such earnings are necessary for the use of a family supported wholly or partly by his labor.

1. Where an order for the examination of persons indebted to a judgment debtor was made, and it appeared, upon the appearance of the parties for examination, that the debtor was dead at the time when the order was made: held, that the proceedings were abated by his death. *Hasewell* v. *Penman*, 2 Abbott, 230.

244. If it appear that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation, for the recovery of such interest or debt; and the court or judge may, by an order, forbid a transfer or other disposition of such interest or debt, until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same, or the court in which the action is brought, at any time, upon such terms as may be just.

245. If any person, party or witness, disobey an order of the referee, properly made in the proceedings before him under this chapter, he may be punished by the court or judge ordering the reference, for a contempt.

1. It is contempt for a party to refuse to obey or answer the writ, on the ground that he is a witness attending on another court. *Page* v. *Randall*, 6 Cal. 32.

TITLE VIII.

ACTIONS IN PARTICULAR CASES.

CHAPTER I.

ACTIONS FOR THE FORECLOSURE OF MORTGAGES.

246. [1860.*] *There shall be but one action for the recovery of any debt, or the enforcement of any right secured by a mortgage, or lien upon real estate, or personal property, which shall be for an enforcement of said lien, or mortgage, in accordance with the provisions of this chapter. In such action, the court shall have power before judgment, or decree, to direct a sale of the incumbered property, or such part thereof as shall be necessary, and the application of the proceeds to the payment of the costs and expenses of the sale, the costs of the writ, and the amount due to the plaintiff. If it shall appear from the sheriff's return that there is a deficiency of such proceeds, and a balance still due to the plaintiff, the judgment shall then be docketed for such balance, and shall, from the time of such docketing, be a lien upon the real estate of the judgment debtor, and an execution may be issued by the clerk of the court, as are other judgments against the property of the judgment debtor, to collect such balance or deficiency.*

1. Where the complaint does not charge the mortgagee in possession with negligence or improper conduct, in leasing the premises, but requires him to account for the rents he actually received, it is proper in the court to refuse to instruct the jury that he might have leased the property differently, and to charge him with what he might have received, if so leased. *Benham* v. *Rowe*, 2 Cal. 387.

2. Where a power of sale is contained in a mortgage, and under a sale by virtue of such power, the mortgagee becomes the purchaser, the equity of redemption still attaches to the property in favor of the mortgagor. In such case, the mortgagor has a clear right to redeem. Ib.

3. The purchaser of a mortgage is subrogated to the rights of the mortgagee. *Johnson* v. *Dopkins*, 3 Cal. 391.

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* Statutes of 1860, 000.

4. Mortgages, at the present day, are considered as merely securities for the payment of money, and no breach of their condition can possibly vest the title in the mortgagee. *Godfrey* v. *Caldwell*, 2 Cal. 493.

5. A conveyance of real estate, conditioned to be void on the payment of a given sum of money on a given day, otherwise to be and remain in full force and virtue, is a mortgage and not a conditional sale. *Ferguson* v. *Miller*, 4 ib. 97.

6. An unrecorded mortgage has priority over a mechanic's lien, which attached subsequently to the execution of the mortgage, if the mechanic had notice thereof. *Rose* v. *Munis*, ib. 173. (See statutes of 1857, 58, an act explaining the same.)

7. In an action of ejectment, brought by a purchaser at sheriff's sale, under a decree of foreclosure and sale of mortgaged premises, to recover the same against the mortgagor in possession, the mortgagor is estopped from setting up title in another, as a defense to the action. *Redman* v. *Bellamy*, ib. 247.

8. An action will not lie on the mere recital in a mortgage of the existence of a debt. In an action upon a promise to pay money, if the complaint contains no averment of consideration, or of indebtedness, except by way of recital, it is insufficient. *Shafer* v. *Bear River and Auburn Company*, ib. 294.

9. A defendant can show on cross-examination that a mortgage has been satisfied, to contradict possession under a mortgage. *Chenery* v. *Palmer*, 5 Cal. 131.

10. A mortgage is a mere incident to the debt which it secures, and follows the transfer of a note with the full effect of a regular assignment. *Peters* v. *Jamestown Bridge Co.*, 5 Cal. 334: *Ord* v. *McKee*, ib. 515; *Bennett* v. *Taylor*, ib. 502; *Bennett* v. *Solomon*, 6 ib. 134; *Phelan* v. *Olney*, ib. 478; *Nagle* v. *Macy*, 9 ib. 426.

11. A mortgage unsatisfied upon record, is a subject of sale to all innocent parties. *Peters v. Jamestown Bridge Co.*, 5 Cal. 334.

12. The purchaser of a mortgage cannot be charged with constructive notice of anything subsequent to the mortgage, except its assignment or satisfaction duly entered of record. A deed from a mortgagee to a third party, for the conveyance of mortgaged premises, does not operate as an assignment of the mortgage. Ib.

13. A writ of assistance will lie to put purchaser under foreclosure, in possession. *Wolf* v. *Fleischacker*, 5 Cal. 244; *Montgomery* v. *Tutt*, 11 ib. 190.

14. The appellate court will not disturb an amended decree for alleged irregularity, if it is what the original decree should have been. *Gronfier* v. *Minturn*, 5 Cal. 492.

15. Five per cent. counsel fee is not in the nature of a penalty, but only a provision against actual expense. *Carriere* v. *Minturn*, 5 Cal. 435.

16. The usual and best method in actions for a foreclosure, is to appoint a master to find and report the amount due. *Guy* v. *Franklin*, 5 Cal. 416.

17. In entering a judgment, the correct rule is to add the interest due on the note up to the time of the judgment, to the principal, and enter the judgment for the gross amount, and such judgment is then to bear the same interest as the notes until paid, although it appears as compounding interest. Ib.; *Emeric* v. *Tams*, 6 Cal. 155; *McCann* v. *Lewis*, 9 Cal. 246.

18. Where a new note on the same terms, between the same parties, for the same sum and of the same date, is given as a substitute for a previous note secured by mortgage, the owner is entitled to a foreclosure on the new note. *Spring* v. *Hill*, 6 Cal. 17.

19. A bill in chancery, in the nature of a bill of peace, and praying for a discovery against joint and several trespassers on real estate, will not lie in favor of a plaintiff out of possession claiming title to the land. *Ritchie* v. *Dorland*, 6 Cal. 33.

20. A mortgage of the defendant in execution who has failed to record his mortgage until after the sale, has no lien or intervening rights as against the purchaser; he can only redeem under the statute. *Smith* v. *Randall*, 6 Cal. 47.

21. Production of a note and mortgage, and proof of service of summons, is sufficient to justify a decree of foreclosure on default. *Smith* v. *Harlan*, 6 Cal. 173.

22. Our statute forbids the mortgagee from recovering the mortgaged estate without action, and confines his remedy to foreclosure. Therefore he has no right to the appointment of a receiver of rents and profits pending the litigation. *Guy* v. *Ide*, 6 Cal. 99.

23. If the complaint refers to the mortgage, a copy of which is thereto annexed, containing a description of the land, it is a sufficient description for the purposes of the action. *Emeric* v. *Tams*, 6 Cal. 155.

24. The record of a mortgage, the certificate of which does not state that the person was *known* to the notary to be the person, &c., is not notice of title to third parties. *Wolf* v. *Fogarty*, 6 Cal. 224; *Kelsey* v. *Dunlap*, 7 ib. 160.

25. A mortgage claim upon the property of a deceased person must be presented to the executors or administrators for allowance, in the same manner as any other claim. *Ellisen* v. *Halleck*, 6 Cal. 386; *Falkner* v. *Folsom*, ib. 412.

26. It is not the province of the mechanic in the case of a subsequent lien, to test the legality of a recorded title; but having contracted with notice of the encumbrances, he is postponed until they are paid. *Ferguson* v. *Miller*, 6 Cal. 402.

27. Where the plaintiff filed his bill to foreclose a mortgage executed by defendants, who admit the demand, but ask that a certain sum be retained in court to answer a judgment to the satisfaction of which they claim that the plaintiff is proportionably liable as a former partner of defendants, although he was not served with process in that case: held, it was error to retain such sum in court. The defendants must satisfy the judgment, and then establish their claim against the plaintiff by action. *Bell* v. *Walsh*, 7 Cal. 84.

28. Where the plaintiff, being the owner of an undivided one-half of a tract of land, mortgaged his interest therein to A, and subsequently, with his co-tenant, conveyed the land to B and C, two-thirds to one and one-third to the other, by two separate deeds, in each of which is set forth the agreement of the grantees to assume the payment of the mortgage; and after the mortgage fell due, the plaintiff filed his bill against B and C, to compel a foreclosure and payment: held, that the case was one of chancery jurisdiction, and that it was not necessary for plaintiff first to pay off the mortgage before bringing his action. *Abell* v. *Coons*, 7 Cal. 105.

29. Where plaintiff leased a lot to B for ten years, at a monthly rent, payable monthly; at the end of the term, B to have two-thirds of the appraised value of the house to be by him erected, and the lease also contained the clause: "And it is further agreed, etc., that the brick house now being built, etc., shall always be and remain, as the same is hereby declared to be, mortgaged as security for the payment of the monthly rent herein stipulated:" held, that it was a mortgage, and that it might be fore-

closed on the non-payment of the first, or any month's rent. *Barroilhet* v. *Battelle*, 7 Cal. 450.

30. Where a judgment is rendered against A and his sureties, and a portion of his sureties, in order to secure the payment of said judgment, mortgage their property, subsequent to which an execution under the judgment is levied upon sufficient property of B, a surety not joining in the mortgage, to satisfy the judgment, and afterwards is voluntarily released: held, that no action can be maintained on the mortgage, for the levy satisfying the judgment, the mortgage, as an incident thereto, must also be thereby satisfied. *People* v. *Chisholm*, 8 Cal. 29.

31. Parol evidence is inadmissible to prove an absolute deed to have been intended as a mortgage, without alleging and proving fraud, mistake or accident in the creation of the instrument. *Lee* v. *Evans*, 8 Cal. 424; *Low* v. *Henry*, 9 Cal. 538.

32. A decree for the sale of mortgaged premises when the mortgagor is dead, should not be sought in the probate court, but in the district court. *Belloc* v. *Rogers*, ib. 123.

33. Under our system, the legal title remains with the mortgagor, subject to be divested by a foreclosure and sale. *Belloc* v. *Rogers*, 9 Cal. 123.

34. A mortgage is not treated as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken. It is a mere security for the debt, and default in the payment, does not change its character. It can neither abridge nor enlarge the interest of the mortgagee, or convert what was previously a security, into a seizin of the freehold. If the mortgage confers no right of possession, entry under it can give none. The owner of a mortgage can only become the owner of the premises under a judicial sale. *McMillan* v. *Richards*, ib. 365; *Nagle* v. *Macy*, ib. 426.

35. The mortgage being a mere security for a debt, it must follow that the payment of the debt, whether before or after default, will operate as an extinguishment of the mortgage. *McMillan* v. *Richards*, ib. 365.

36. The sale of the mortgaged premises *as such*, only follows the express decree of the court foreclosing the equity of redemption. *Low* v. *Henry*, ib. 538; *Haffley* v. *Maier*, Cal. April T. 1859.

37. In a foreclosure suit, judgment may be rendered for the amount found due upon the personal obligation, to secure which the mortgage is executed. *Rollins* v. *Forbes*, 10 Cal. 299; *Rowland* v. *Leiby*, Cal. Oct. T. 1859.

38. In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill. *Raun* v. *Reynolds*, 11 Cal. 14.

39. Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree, and if, upon its service, that is disregarded, the court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite, but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ of assistance as against the defendant in the suit. *Montgomery* v. *Tutt*, ib. 190.

40. The general rule of courts of equity in foreclosure suits is, that all persons materially interested should be made parties, in order that complete justice may be done and multiplicity of suits avoided. It is not, however, absolutely essential in all cases to make subsequent incumbrancers, prior to suit of foreclosure, parties to the suit. If

not so made, they are not bound by the decree; but they are not necessary parties to a decree as between the mortgagor and mortgagee; and in many cases where the value of the property is less than the mortgage, it may be unimportant to the mortgagee to make them parties, and it would be a great hardship to compel him to make them so. *Montgomery* v. *Tutt*, 11 Cal. 307.

41. Their equity of redemption from the foreclosure, if not made parties, continues, and this they can assert at any time within the period allowed by the statute of limitations. The equity of redemption of a subsequent incumbrancer who has been made a party and has had his day in court, is by the decree taken away, leaving only the statutory right. Ib.

42. In an action of foreclosure of mortgage, when there are several subsequent incumbrancers, who have been duly served with process and suffered default, and one who was not served, and when it appears that the property has been sold under the decree for a sum less than the amount due upon the mortgage, and no question as to the regularity or fairness of the sale is made, the defendants so served are not in the position to complain that their co-defendant was not properly served. Ib.

43. The omission of the words "be sold" in a judgment of foreclosure, after the description of the premises, is a mere clerical error, which will not affect the judgment. *Moore* v. *Semple*, 11 Cal. 360.

44. All persons having a legal interest in the mortgage, as well as those who have the equitable interest therein, are necessary parties to the bill to foreclose. *Tyler* v. *Yreka Water Co.*, Cal. Oct. T. 1859.

45. The debtor is as much in default for not paying when the mortgage debt is due, as the creditor is in default for not receiving the money afterwards when offered. It would be very harsh to hold that the debt is lost, the general effect of losing the security by the mere refusal at a particular moment to receive it, that refusal, induced by a variety of circumstances, morally excusing it. *Perre* v. *Castro*, Cal. Jan. T. 1860.

46. The owner of the equity of redemption is a necessary party to a suit on foreclosure. *Hall* v. *Nelson*, 23 Barb. 88.

47. Under a mortgage foreclosure and sale, a tenant in possession, who has been made a party, is bound to attorn to the purchaser, or be removed by writ of assistance, notwithstanding he claims under an unexpired lease of several years, executed by the mortgagors previous to the date of the mortgage foreclosed. *Lovett* v. *German Ref. Church*, 9 How. Pr. 220.

247. If there be surplus money remaining after payment of the amount due on the mortgage, lien or incumbrance, with costs, the court may cause the same to be paid to the person entitled to it, and in the mean time may direct it to be deposited in court.

248. If the debt for which the mortgage, lien or incumbrance is held, be not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale shall cease; and afterwards, as often as more becomes due, for principal or interest, the

court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

1. A defendant cannot object that his wife, who joined in executing the mortgage, is not made a co-defendant. *Powell* v. *Ross*, 4 Cal. 197.

2. In a suit to foreclose a mortgage, an adverse claimant cannot be made a party for the purpose of testing the validity of his adverse title. *Corning* v. *Smith*, 2 Seld. 82.

CHAPTER II.

ACTIONS FOR NUISANCE, WASTE AND WILLFUL TRESPASS, IN CERTAIN CASES, ON REAL PROPERTY.

249. Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment, the nuisance may be enjoined or abated, as well as damages recovered.

1. A person in authority, who destroys the house of another in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, is not personally liable in an action by the owner of the property destroyed. *Dunbar* v. *San Francisco*, 1 Cal. 355; *Surocco* v. *Geary*, 3 ib. 69.

2. The right to recover for use and occupation is founded alone on contract. A trespass dies with the trespasser. *O'Connor* v. *Corbitt*, ib. 370.

3. The common law remedy in the abatement of nuisances still remains in those cases not embraced in the statute. *Stiles* v. *Laird*, 5 ib. 120.

250. If a guardian, tenant for life or years, joint tenant, or tenant in common of real property, commit waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

251. Any person who shall cut down, or carry off any wood or underwood, tree or timber, or girdle or otherwise injure any tree or timber on the land of another person, or on the street or highway in

front of any person's house, village or city lot, or cultivated grounds; or on the commons or public grounds of any city or town; or on the street or highway in front thereof, without lawful authority, shall be liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor, in a civil action, in any court having jurisdiction.

252. Nothing in the last section shall authorize the recovery of more than the just value of the timber taken from uncultivated woodland, for the repair of a public highway or bridge upon the land, or adjoining it.

253. If a person recover damages for a forcible or unlawful entry in or upon, or detention of, any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

1. The demand for treble damages must be expressly inserted in the declaration. *Chipman* v. *Emeric*, 5 Cal. 239.

2. If the court fails to treble the damages, the remedy is not by mandamus, but by appeal. *Early* v. *Mannix*, Cal. Jan. T. 1860.

CHAPTER III.

ACTIONS TO DETERMINE CONFLICTING CLAIMS TO REAL PROPERTY, AND OTHER PROVISIONS RELATING TO ACTIONS CONCERNING REAL ESTATE.

254. An action may be brought by any person (*a*) in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse claim, estate or interest.

See section 260.

(*a*) STATUTES OF 1857, 62.

An act concerning tenants in common, joint tenants and coparceners. Passed Mar. 6, 1857.

1. All persons holding as tenants in common, or joint tenants, or coparceners, or any number less than all, may jointly or severally bring or defend any civil action for the enforcement or protection of the rights of such party.

1 This provision sustained. *Merced Mining Co.* v. *Fremont*, 7 Cal. 317.

2. A person cannot be dispossessed of his property under an order of court proceeding *ex parte* on the statement of the plaintiff, and without citation or notice to the defendant. *Ladd* v. *Stephenson*, 1 ib. 18.

3. In an action for the recovery of land, if the plaintiff proves no title, the defendants being in possession cannot be ousted; but if the defendants have entered, claiming under the plaintiff and in subordination to his title, they are estopped from questioning it. *Hoen* v. *Simmons*, ib. 119.

4. A deed purporting to convey real estate, executed by an agent or attorney in his own name, instead of the name of his principal, is not binding upon the latter, and does not transfer title of the property. *Fisher* v. *Salmon*, ib. 413.

5. A party already having the legal and equitable title, cannot sue for a further conveyance. *Truebody* v. *Jacobson*, 2 ib. 82.

6. In a possessory action it is sufficient for the plaintiff to state that he was lawfully entitled to the possession of the premises, without setting out the evidence of his right. *Godwin* v. *Stebbins*, ib. 103.

7. A vendor has a lien on the land sold, for the purchase money, unless he has taken security for its payment, though he has executed the conveyance. And where he has not conveyed the title, his position is analagous to that of a mortgagee. A purchaser in possession cannot reclaim the purchase money on account of defect in the title, unless he has been evicted or disturbed. A party cannot ask the rescission of a contract on account of an obstacle to its completion, caused by his own fault. Caveat emptor applies in sales of real estate, where there is no fraud, warranty, etc. *Salmon* v. *Hoffman*, ib. 138.

8. Where the title of the plaintiff is inchoate and incomplete, he cannot sustain an ejectment, and the court properly rejected such title as testimony. *Leese* v. *Clarke*, 3 ib. 18.

9. To sustain a grant from a town, it is necessary to show that the lands granted were the property of the town. When such grant contains a surplus, the title is good for the whole lot, defeasible for the surplus. *Vanderslice* v. *Hanks*, ib. 28; *Touchard* v. *Touchard*, 5 ib. 306.

10. A deed of "one-half my lot," accompanied by proof that the grantor owned at the time but one lot in the place, is not void for uncertainty in the description. But if such deed is not void, it can only convey an undivided half of the said lot, and the grantee can only take as tenant in common with the grantor. One tenant in common cannot sustain an action of forcible entry and detainer against another for holding over. He must first resort to a court of equity for a partition of the land in dispute. *Lick* v. *O'Donnell*, 3 ib. 59.

11. A party is not allowed to controvert the declaration he has made by deed. *Tartar* v. *Hall*, ib. 263.

12. By the laws of Mexico, towns were invested with the ownership of lands. By the laws, usage, and customs of Mexico, the alcaldes were the heads of the ayuntamientos or town councils; were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns. *Cohas* v. *Raisin*, ib. 443; *Seale* v. *Mitchell*, 5 ib. 401; *Dewey* v. *Lambier*, 7 ib. 347.

13. Possession is always *prima facie* evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser. The allegation of possession at the time of the ouster complained of, is a sufficient allegation of title to sustain the declaration. *Hutchinson* v. *Perley*, 4 Cal. 33; *Winans* v. *Christy*, ib. 70; *Plume* v. *Seward*, ib. 94; *Sacramento Valley R. R. Co.* v. *Moffatt*, 7 ib. 577; *Nagle* v. *Macy*, 9 ib. 426.

14. In actions for the recovery of land, possession is *prima facie* evidence of title, and this principle is firmly fixed in all common law jurisprudence. *Hicks* v. *Davis*, 4 ib. 67.

15. Possession coupled with the color of title must prevail, except where a better title is shown in the defendants; and where a plaintiff in ejectment pleads a fee simple title, he is not compelled to prove the same, but can properly rely on prior possession if he choose to do so. *Winans* v. *Christy*, ib. 70.

16. A vendor of real estate who makes no conveyance, but gives a bond conditioned for the execution of a conveyance, on payment of the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of his lien. *Gouldin* v. *Buckelew*, ib. 107.

17. Where a tract of land sold for a gross sum is described by specific boundaries, and as containing so many acres, more or less, the vendor cannot recover for the overplus, if in a survey it can be ascertained that more land is contained in the tract than the precise amount in the deed. *Chipman* v. *Briggs*, 5 ib. 76.

18. The fact of prior possession being evidence of title, is not for a jury to determine, it is so declared by law. *Castro* v. *Gill*, ib. 40.

19. Where two parties rely upon possession solely, as proof of title, the presumption of ownership is in favor of the first possessor. *Potter* v. *Knowles*, ib. 87.

20. To enable the plaintiff to recover in an action of ejectment, founded on prior possession, he must allege and prove an actual ouster by defendants, or those under whom he holds. *Payne* v. *Treadwell*, ib. 310; *Watson* v. *Zimmerman*, 6 ib. 46.

21. Prior possession will entitle the possessor to maintain an action against a trespasser. *Grover* v. *Hawley*, 5 ib. 485; *Merced Mining Co.* v. *Fremont*, 7 ib. 317; *Bird* v. *Lisbros*, 8 ib. 1; *Nagle* v. *Macy*, 9 ib. 426.

22. In many cases it is a question of fact, what is an actual and what a constructive possession. *O'Callaghan* v. *Booth*, 6 ib. 63.

23. A trespass against one defendant may be sustained, although a declaration may aver joint trespass on the part of several. Possession is sufficient to enable a recovery against a trespasser, and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. *McCarren* v. *O'Connell*, 7 ib. 152.

24. A mere survey and marking lines of a boundary, without an enclosure of the premises, is not a possession in law, unless made so by complying with the statute in reference to the mode of maintaining possessory actions on public lands. *Bird* v. *Dennison*, ib. 298.

25. In ejectment, one or many defendants may be sued, and they may answer separately or demand separate verdicts; if they do not, they will be concluded by a general verdict. *Ellis* v. *Jeans*, ib. 409.

26. In an action of ejectment brought solely on the actual prior possession of the plaintiff, the defendant being a mere trespasser, the latter cannot justify his act by showing the true title to be outstanding in a third person. *Bird* v. *Lisbros*, 8 Cal. 1.

27. Ejectment must be brought against the occupant, as it is a possessory action; it determines no rights but those of possession at the time, and it matters not who has, or claims to have, the title of the premises. It will only lie against the party out of possession when the premises are unoccupied, and his claim is accompanied with the exercise of acts of ownership, as enclosure, cultivation and the like. *Garner* v. *Marshall*, 9 ib. 268.

28. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. Ib.

29. Ejectment is a possessory action, and must be brought against the occupant; it determines no right but those of possession at the time. Ib.

30. It will only lie against a party out of possession claiming title when the premises are unoccupied, and his claim is accompanied with the exercise of acts of ownership, such as enclosure, cultivation and the like. Ib.

31. In an action of ejectment, a tenant cannot deny the title of the vendor of his landlord. *McKune* v. *Montgomery*, ib. 575.

32. In ejectment, a defendant, under the plea of a general denial, cannot introduce the record of a former recovery. *Piercy* v. *Sabin*, 10 ib. 22.

33. In an action of ejectment to recover possession of a large tract of land, where the defendant failed to appear, and the case was submitted to the court, who found that the plaintiff had title to the whole tract, and that defendant was in possession of a part, without right: held, that it was proper for the court to enter judgment for the plaintiff for the possession of the whole tract. *Vallejo* v. *Fay*, ib. 377.

34. In an action against several defendants, the plaintiff has the right to prove what part of the land in dispute was occupied by one of the defendants. *Ellis* v. *Janes*, ib. 456.

35. In an action of ejectment, a juror who has formed an opinion adverse to the validity of title under which defendants claimed, is an incompetent juror. *White* v. *Moses*, 11 Cal. 68.

36. Where the plaintiff seeks to establish the loss of a deed under which he deraigns title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact for the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have the possession or control of the original, and in the absence of other evidence, his affidavit should have been offered. *Fallon* v. *Dougherty*, 12 ib. 104.

37. In an action of ejectment, the plaintiff must aver either title or possession. The mere taking from the land, herbage growing thereon, is not sufficient to give a right of possession. *Steinback* v. *Fitzpatrick*, ib. 295.

38. Possession of part of land under a deed for the whole tract, when the possessor's grantors had the land surveyed and the lines marked out by blazing trees, is sufficient possession against a party who enters upon a part of the tract, and builds a fence wholly insufficient for any other purpose than to mark the line of his claim. *Baldwin* v. *Simpson*, 12 Cal. 560.

39. A complaint was verified setting forth that the plaintiffs were owners and entitled to possession of certain claims, and that defendants wrongfully and unlawfully entered upon and dispossessed the plaintiffs. The answer denies specifically the allegations of ownership and right of possession, and denies that the defendants wrongfully and unlawfully entered and dispossessed the plaintiffs. The facts of entry and ouster are the only issuable facts presented in this allegation, and in the absence of a denial in positive and unequivocal terms, they are for the purposes of the action to be taken as true. *Buzenius* v. *Coffee*, Cal. July T. 1859.

40. A deed of trust to A by B to sell his property and pay a debt due C, on default of payment, is a deed of trust and not a mortgage; no foreclosure is necessary nor does there exist an equity of redemption. *Kock* v. *Briggs*, Cal. Oct. T. 1859.

41. Where the complaint is verified and alleges his title, and the answer does not deny the same, the plaintiff is not required to prove the title, that being admitted. *Powell* v. *Oulahan*, ib.

42. A title subseqnently acquired by a mortgagor enures to the benefit of his mortgagee, as much so as if that title had been originally possessed by him. *Clarke* v. *Baker*, Cal. Jan. T. 1860.

43. By the execution of the mortgage the transaction between them is only begun; every substantial part remains to be performed; the mortgagee is to return to the mortgagor the estate, and the mortgagor is to return to the mortgagee the money and interest secured, and until this is consummated, the obligation rests upon both to do nothing which can impair the rights of the other or embarrass their enforcement. Ib.

44. Damages can never be recovered for use and occupation anterior to the existence of plaintiff's right of possession. *Clarke* v. *Boyreau*, Cal. Jan. T. 1860.

45. This statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. *Curtis* v. *Sutter*, ib.

255. If the defendant in such action disclaim in his answer, any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs.

256. In an action for the recovery of real property, where the plaintiff shows a right to recover at the time the action was commenced, but it appears that his right has terminated during the pendency of the action, the verdict and judgment shall be according to the fact; and the plaintiff may recover damages for withholding the property.

257. When damages are claimed for withholding the property recovered, upon which permanent improvements have been made by a defendant, or those under whom he claims, holding under cover of title adversely to the claims of the plaintiff, in good faith, the value of such improvements shall be allowed as a set-off against such damages.

1. The provisions of this section sustained. *Ford* v. *Holton*, 5 Cal. 319; *Welch* v. *Sullivan*, 8 ib. 511.

258. [1860.*] The court in which an action is pending for the real property, *or a judge thereof, or a county judge*, may on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property, and make survey and measurement thereof, for the purposes of the action.

259. The order shall describe the property, and a copy thereof shall be served on the owner or occupant; and thereupon such party may enter upon the property, with necessary surveyors and assistants, and may make such survey and measurements; but if any unnecessary injury be done to the property, he shall be liable therefor.

260. A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale.

1. This takes from the instrument its common law character, and restricts it to the purposes of security. It does not, in terms, change the estates at law of the mortgagor and mortgagee, but, by disabling the owner from entering for condition broken, and restricting his remedy to a foreclosure and sale, it gives full effect to the equitable doctrine, upon a consideration of which this section was evidently drawn. *McMillan* v. *Richards*, 9 Cal. 365.

261. The court may, by injunction, on good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon; or after a sale on execution before a conveyance.

1. This remedy is only preventive; it is not exclusive of any other remedy. *Sands* v. *Pfeiffer*, 10 Cal. 258.

262. When real property shall have been sold on execution, the purchaser thereof, or any person who may have succeeded to his interest, may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession, after sale and before possession is delivered under the conveyance.

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* Statutes of 1860, 000.

263. An action for the recovery of real property against a person in possession, cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

CHAPTER IV.

ACTIONS FOR THE PARTITION OF REAL PROPERTY.

264. [1854.*] When several persons hold and are in possession of real property, as joint tenants, or as tenants in common, in which one or more of them have an estate of inheritance, or for life or lives, or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein; and for a sale of such property, or a part of it, if it appear that a partition cannot be made without great prejudice to the owners.

1. A suit for the partition of lands is a regular proceeding, and may be prosecuted by summons and complaint. *Myers* v. *Rasback*, 4 How. Pr. 63.

265. The interests of all persons, in the property, whether such persons be known or unknown, shall be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties, or the share or quantity of interest of any of the parties, be unknown to the plaintiff, or be uncertain or contingent, or the ownership of the inheritance depend upon an executory devise, or the remainder be a contingent remainder, so that such parties cannot be named, that fact shall be set forth in the complaint.

266. No persons who have or claim any liens upon the property, by mortgage, judgment, or otherwise, need be made parties to the action, unless such liens be matters of record.

267. Immediately after filing the complaint, the plaintiff shall file with the recorder of the county in which the property is situated, a notice of the pendency of the action, containing the names of the par-

* Statutes of 1854, 84.

ties so far as known, the object of the action, and a description of the property to be affected thereby. From the time of the filing, it shall be deemed notice to all persons.

268. The summons shall be directed to all the joint tenants and tenants in common, and all persons having any interest in, or any liens of record by mortgage, judgment or otherwise, upon the property, or upon any particular portion thereof; and generally, to all persons unknown, who have or claim any interest in the property.

1. Two corporations cannot hold land together as joint tenants. *De Witt* v. *City of San Francisco*, 2 Cal. 289.

269. If a party having a share or interest is unknown, or any one of the known parties reside out of the state, or cannot be found therein, and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party, by publication as in other cases. When publication is made, the summons, as published, shall be accompanied by a brief description of the property which is the subject of the action.

See section 31.

270. The defendants who have been personally served with the summons, and a certified copy of the complaint, shall set forth in their answers, fully and particularly, the nature and extent of their interest in the property; and if such defendants claim a lien upon the property, by mortgage, judgment, or otherwise, they shall state the amount and date of the same, and the amount remaining due thereon, and whether the amount has been secured in any other way or not; and if secured, the extent and nature of the security; or they shall be deemed to have waived their right to such lien.

271. The rights of several parties, plaintiffs as well as defendants, may be put in issue, tried and determined by such action; and when a sale of the premises is necessary, the title shall be ascertained by proof to the satisfaction of the court, before the judgment of sale shall be made; and where service of the complaint has been made by publication, like proof shall be required of the right of the absent or unknown parties, before such judgment is rendered; except that

where there are several unknown persons having an interest in the property, their rights may be considered together in the action, and not as between themselves.

272. The plaintiff shall produce to the court, on the hearing of the case, the certificate of the recorder of the county where the property is situated, showing whether there were or not any liens outstanding of record upon the property, or any part thereof, at the time of the commencement of the action.

273. If it appear by the certificate of the recorder that there were outstanding liens of record at the time of the commencement of the action, and the persons holding or claiming such liens are not made parties to the action, the court shall either order such parties to be brought in by an amendment, or supplemental complaint, or appoint a referee to ascertain whether their liens have been paid; or if not paid, what amount remains due, and their order among the liens held by the parties who have appeared and answered; and whether the amount remaining due thereon has been secured in any way, and if secured, the extent and nature of the security.

274. The plaintiff shall cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in last section, on each person having outstanding liens of record, who is not a party to the action, to appear before the referee at a specified time and place, to make proof by his own affidavit or otherwise of the true amount due, or to become due, contingently or absolutely thereon. In case such person be absent, or his residence be unknown, service may be made by publication, or notice to his agents, under the direction of the court, in such manner as may be proper. The report of the referee thereon shall be made to the court, and shall be confirmed, modified, or set aside, and a new reference ordered, as the justice of the case may require.

275. If it be alleged in the complaint, and be established by evidence, or if it appear by the evidence without such allegation in the complaint, to the satisfaction of the court, that the property, or any part of it, is so situated that partition cannot be made without great

prejudice to the owners, the court may order a sale thereof. Otherwise, upon the requisite proofs being made, it shall order a partition, according to the respective rights of the parties, as ascertained by the court, and appoint three referees therefor; and shall designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

1. Notice of commissioners' proceedings in partition is not required by statute to be given to the parties. The parties, however, should have an opportunity to be heard before the commissioners, before making partition. *Row* v. *Row*, 4 How. Pr. 133.

276. In making the partition, the referees shall divide the property, and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties, as determined by the court, designating the several portions by proper landmarks; and may employ a surveyor, with the necessary assistants, to aid them therein.

277. The referees shall make a report of their proceedings, specifying therein the manner of executing their trust, describing the property divided, and the shares allotted to each party, with a particular description of each share.

278. The court may confirm or set aside the report, and if necessary, appoint new referees. Upon the report being confirmed, judgment shall be rendered that such partition be effectual forever; which judgment shall be binding and conclusive:

1st. On all persons named as parties to the action, and their legal representatives, who have at the time any interest in the property divided, or any part thereof, as owners in fee, or as tenants for life, or for years; or as entitled to the reversion, remainder, or the inheritance of such property, or of any part thereof, after the termination of a particular estate therein; and who, by any contingency, may be entitled to a beneficial interest in the property, or who have an interest in any undivided share thereof, as tenants for years or for life;

2d. On all persons interested in the property, who may be unknown, to whom notice shall have been given of the action for partition by publication; and,

3d. On all other persons claiming from such parties or persons, or either of them.

1. The report of commissioners in partition will be set aside only upon grounds similar to those upon which a verdict would be set aside and a new trial granted. *Doubleday* v. *Newton*, 9 How. Pr. 71.

279. But such judgment and partition shall not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.

280. The expenses of the referees, including those of a surveyor and his assistant, when employed, shall be ascertained and allowed by the court; and the amount thereof, together with the fees allowed by law to the referees, shall be apportioned among the different parties to the action.

281. When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party; but such share shall be first charged with its just proportion of the costs of the partition, in preference to such lien.

282. When a part of the property only is ordered to be sold, if there be an estate for life, or years, in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

283. The proceeds of the sale of the incumbered property shall be applied under the direction of the court, as follows:

1st. To pay its just proportion of the general costs of the action;

2d. To pay the costs of the reference;

3d. To satisfy and cancel of record the several liens in their order of priority, by payment of the sums due and to become due; the amount due to be verified by affidavit at the time of payment;

4th. The residue among the owners of the property sold, according to their respective shares therein.

284. Whenever any party to an action who holds a lien upon the property, or any part thereof, has other securities for the payment of

the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale, or may order a just deduction to be made from the amount of the lien on the property, on account thereof.

285. The proceeds of sale, and the securities taken by the referees, or any part thereof, shall be distributed by them to the persons entitled thereto, whenever the court so directs. But in case no direction be given, all such proceeds and securities shall be paid into court, or deposited therein, or as directed by the court.

286. When the proceeds of sales of any shares or parcels belonging to persons who are parties to the action, and who are known, are paid into court, the action may be continued as between such parties, for the determination of their respective claims thereto, which shall be ascertained and adjudged by the court. Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action.

287. All sales of real property, made by referees under this chapter, shall be made by public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice shall state the terms of sale, and if the property or any part of it is to be sold, subject to a prior estate, charge, or lien, that shall be stated in the notice.

288. The court shall, in the order for sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit, and for that portion of which the purchase money is required, by the provisions hereinafter contained, to be invested for the benefit of unknown owners, infants, or parties out of the state.

289. [1854.*] The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase

* Statutes of 1854, 84.

money, of such parts of the property as are directed by the court to be sold on credit, for the shares of any known owner of full age, in the name of such owner; and for the shares of an infant in the name of the guardian of such infant; and for other shares in the name of the clerk of the county and his successors in office.

290. The person entitled to a tenancy for life, or years, whose estate shall have been sold, shall be entitled to receive such sum as may be deemed a reasonable satisfaction for such estate, and which the person so entitled may consent to accept instead thereof, by an instrument in writing, filed with the clerk of the court. Upon the filing of such consent, the clerk shall enter the same in the minutes of the court.

291. If such consent be not given, filed and entered, as provided in the last section, at or before a judgment of sale is rendered, the court shall ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate; and shall order the same to be paid to such party, or deposited in court for him, as the case may require.

292. If the person entitled to such estate for life or years be unknown, the court shall provide for the protection of their rights, in the same manner, as far as may be, as if they were known and had appeared.

293. In all cases of sales, when it appears that any person has a vested or contingent future right or estate in any of the property sold, the court shall ascertain and settle the proportional value of such contingent or vested right or estate, and shall direct such proportion of the proceeds of the sale to be invested, secured or paid over, in such manner as to protect the rights and interests of the parties.

294. In all cases of sales of property, the terms shall be made known at the time; and if the premises consist of distinct farms or lots, they shall be sold separately.

295. Neither of the referees, nor any person for the benefit of either of them, shall be interested in any purchase; nor shall a guardian of an infant party be interested in the purchase of any real property, being the subject of the action, except for the benefit of the infant. All sales contrary to the provisions of this section shall be void.

296. After completing a sale of the property, or any part thereof ordered to be sold, the referees shall report the same to the court, with a description of the different parcels of land sold to each purchaser; the name of the purchaser; the price paid as secured; the terms and conditions of the sale; and the securities, if any, taken. The report shall be filed in the office of the clerk of the county where the property is situated.

297. If the sale be confirmed by the court, an order shall be entered, directing the referees to execute conveyances and take securities pursuant to such sale; which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of the sale.

298. When a party entitled to a share of the property, or an incumbrancer entitled to have his lien paid out of the sale, becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

299. The conveyances shall be recorded in the county where the premises are situated, and shall be a bar against all persons interested in the property in any way, who shall have been named as parties in the action; and against all such parties and persons as were unknown, if the summons had been served by publication, and against all persons claiming from them, or either of them.

300. When there are proceeds of sale belonging to an unknown owner, or to a person without the state, who has no legal representative within it, the same shall be invested in securities on interest, for the benefit of the persons entitled thereto.

301. When the security of the proceeds of sale is taken, or when

an investment of any such proceeds is made, it shall be done, except as herein otherwise provided, in the name of the clerk of the county where the papers are filed, and his successors in office, who shall hold the same for the use and benefit of the parties interested, subject to the order of the court.

302. When security is taken by the referees on a sale, and the parties interested in such security, by an instrument in writing under their hands, delivered to the referees, agree upon the shares and proportions to which they are respectively entitled; or, when shares and proportions have been previously adjudged by the court, such securities shall be taken in the names of, and payable to, the parties respectively entitled thereto; and shall be delivered to such parties upon their receipt therefor. Such agreement and receipt shall be returned and filed with the clerk.

303. The clerk in whose name a security is taken, or by whom an investment is made, and his successors in office, shall receive the interest and principal as it becomes due, and apply and invest the same as the court may direct; and shall file in his office all securities taken, and keep an account in a book provided and kept for that purpose, in the clerk's office, free for inspection by all persons, of investments and moneys received by him thereon, and the disposition thereof.

304. When it appears that partition cannot be made equal between the parties, according to their respective rights, without prejudice to the rights and interests of some of them, and a partition be ordered by judgment, the court may adjudge compensation to be made by one party to another, on account of the inequality of partition. But such compensation shall not be required to be made to others, by owners unknown, nor by infants, unless, in case of an infant, it appear that he has personal property sufficient for that purpose, and that his interest will be promoted thereby.

305. When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian, or the special guardian appointed for him in the action, upon giving the security required by law, or directed by order of the court.

306. The guardian who may be entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, whose interest in real property shall have been sold, may receive, in behalf of such person, his share of the proceeds of such real property, from the referees, on executing with sufficient sureties, an undertaking approved by a judge of the court, or by a county judge, that he will faithfully discharge the trust reposed in him, and will render a true and just account to the person entitled, or his legal representative.

307. The general guardian of an infant, and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy, or in common, or in any other manner so as to authorize his being made a party to an action for the partition thereof, may consent to a partition without action, and agree upon the share to be set off to such infant, or other person entitled, and may execute a release in his behalf to the owners of the shares, of the parts to which they may be respectively entitled, upon an order of the court.

308. The costs of partition, including fees of referees and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them.

309. The court, with the consent of the parties, may appoint a single referee, instead of three referees, in the proceedings under the provisions of this chapter; and the single referee, when thus appointed, shall have all the powers and perform all the duties required of the three referees.

CHAPTER V.

ACTIONS FOR THE USURPATION OF AN OFFICE OR FRANCHISE.

310. An action may be brought by the attorney general in the name of the people of this state, upon his own information, or upon the complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state. And it shall be the duty of the attorney general to bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.

See section 25, of the judiciary act, post.

1. Office terms should not be extended beyond the time clearly defined, but rather shortened by implication, if necessary. *People* v. *Brenham*, 3 Cal. 477.

2. In an action by one claiming to have been elected to an office against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show prima facie that a vacancy existed in the office, and that he was elected to fill it. *Doane* v. *Scannell*, 7 ib. 393.

3. A certificate of election is not necessary to enable a party, claiming to have been elected, to bring his action by quo warranto. *Magee* v. *Board of Supervisors of Calaveras county*, 10 ib. 376.

4. In an action in the nature of a quo warranto, the place of trial may properly be laid in any county of the state. *People* v. *Cook*, 6 How. Pr. 448.

5. An action in the nature of a quo warranto is the only proper remedy, where an unauthorized person has usurped the office of alderman, in a municipal corporation. *Lewis* v. *Oliver*, 4 Abbott, 121.

311. Whenever such action is brought, the attorney general, in addition to the statement of the cause of action, may also set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to the office, and by means of his usurpation thereof, an order may be granted by a judge of the supreme court, or a district judge, for the arrest of such defendant, and holding him to bail; and thereupon he may be arrested, and held to bail, in the same manner, and with the

same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest.

1. Our statutes recognize the difference between mandamus and quo warranto, as held in England. *People* v. *Olds*, 3 Cal. 167.

2. The complaint, to authorize the party claimant to be plaintiff, should state facts showing that he is entitled to the office from which the defendant is sought to be ousted. *People* v. *Ryder*, 2 Kern. 433.

3. It rests in the discretion of the attorney general to bring an action against a person alleged to have usurped a public office. A mandamus will not be granted to compel him to institute such action. *People* v. *Attorney General*, 23 Barb. 114; 3 Abbott, 131.

4. Under this action, an injunction restraining generally the functions of the office is not authorized by law. *People* v. *Draper*, 14 How. Pr. 233.

312. In every such case, judgment may be rendered upon the right of the defendant, and also upon the right of the party so alleged to be entitled; or only upon the right of the defendant, as justice shall require.

313. If the judgment be rendered upon the right of the person so alleged to be entitled, and the same be in favor of such person, he shall be entitled, after taking the oath of office, and executing such official bond as may be required by law, to take upon himself the execution of the office.

314. If judgment be rendered upon the right of the person so alleged to be entitled, in favor of such person, he may recover, by action, the damages which he shall have sustained by reason of the usurpation of the office by the defendant.

1. In an action in the nature of a quo warranto, brought against an alleged intruder upon a public office, the judgment of the court, if for the plaintiff, can only be a judgment of ouster, and for costs. The claim for fees must be asserted in a separate action. *People* v. *Snedeker*, 3 Abbott, 233.

315. When several persons claim to be entitled to the same office or franchise, one action may be brought against all such persons, in order to try their respective rights to such office or franchise.

316. When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully

holding any office, franchise, or privilege, judgment shall be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding five thousand dollars; which fine, when collected, shall be paid into the treasury of the state.

CHAPTER VI.

OF ACTIONS AGAINST STEAMERS, VESSELS, AND BOATS. (a)

1. Admiralty jurisdiction must be received, pro tanto, in principle and forms, in state courts. *Averill* v. *Hartford*, 2 Cal. 308; *Taylor v. Columbia*, 5 ib. 268; *Warner* v. *Uncle Sam*, 9 ib. 697.

2. For a full decision on points of jurisdiction, &c., of this chapter, see *Thompson* v. *Julius D. Morton*, 23 Ohio, 26; 3 Livingston's Law Mag. 125.

317. [1860.*] *All steamers, vessels, and boats shall be liable:*

1*st. For services rendered on board at the request of, or on contract with, their respective owners, masters, agents, or consignees;*

2*d. For supplies furnished for their use at the request of their respective owners, masters, agents, or consignees;*

3*d. For materials furnished for their construction, repair or equipment;*

4*th. For their wharfage and anchorage within this state;*

5*th. For non-performance or mal-performance of any contract for the transportation of persons or property, made by their respective owners, masters, agents, or consignees;*

6*th. For injuries committed by them to persons or property.*

The said several causes of action shall constitute liens upon all steamers, vessels and boats, and have priority in their order herein enumerated, and shall have preference over all other demands: provided such liens shall only continue in force for the period of one year from the time the cause of action accrued.

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* Statutes of 1860, 000.

(a) *Souter* v. *Sea Witch*, 1 Cal. 162; *Ray* v. *Harbeck*, ib. 451, refer to the act of 1850, which has been by this chapter repealed.

1. The transportation of property applies to towing other vessels or craft. *White* v. *Mary Ann*, 6 Cal. 462.

318. Actions for demands arising upon any of the grounds specified in the preceding section, may be brought directly against such steamers, vessels, or boats.

319. The complaint shall designate the steamer, vessel or boat, by name, and shall be verified by the oath of the plaintiff, or some one on his behalf.

320. The summons attached to a certified copy of the complaint, may be served on the master, mate, or any person having charge of the steamer, vessel, or boat, against which the action is brought.

321. The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the steamer, vessel or boat, against which the action is brought, with its tackle, apparel, and furniture, attached, as security for the satisfaction of any judgment that may be recovered therein.

322. The clerk of the court shall issue a writ of attachment, on the application of the plaintiff, upon receiving a written undertaking on behalf of the plaintiff, executed by two or more sufficient sureties, to the effect, that if judgment be rendered in favor of the steamer, vessel or boat, as the case may be, he will pay all costs and damages that may be awarded against him, and all damages which may be sustained by such steamer, vessel or boat, from the attachment, not exceeding the sum specified in the undertaking, which shall in no case be less than five hundred dollars, when the attachment is issued against a steamer or vessel, or less than two hundred dollars when issued against a boat. The undertaking shall be accompanied by an affidavit of each of the sureties, that he is a resident and freeholder or householder of the county, and worth double the amount specified in the undertaking, over and above all of his just debts and liabilities. The clerk shall file the undertaking and affidavits.

323. The writ shall be directed to the sheriff of the county within which the steamer, vessel, or boat lies, and direct him to attach such

steamer, vessel or boat, with its tackle, apparel and furniture, and keep the same in his custody until discharged by due course of law; unless the owner, master, agent, or consignee thereof, give him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy the demand in suit, which shall be specified in the writ, besides costs; in which case to take such undertaking.

1. If the attachment was void, no proceeding can be had on the release bond. *McQueen* v. "*Russell*," 1 Cal. 165.

2. The service of process in the manner prescribed by statute, is equivalent to an actual seizure. *Meiggs* v. *Scannell*, 7 ib. 405.

3. The lien attaches only when service is had in the action, and not when the liability was incurred. *Fisher* v. *White*, 8 ib. 418.

324. The sheriff to whom the writ is directed and delivered shall execute the same without delay, and shall, unless the undertaking mentioned in the last section be given, attach and keep in his custody the steamer, vessel or boat named therein, with its tackle, apparel and furniture, until discharged by due course of law; but the sheriff shall not be authorized by any such writ to interfere with the discharge of any merchandise on board of such steamer, vessel or boat, nor with the removal of any trunks or other property of passengers, or of the captain, mate, seamen, steward, cook, or other persons employed on board.

325. The owner, master, agent, or consignee of the steamer, vessel or boat, against which the action is brought, may appear and answer, or plead to the action; and may except to the sufficiency of the sureties on the undertaking filed on the behalf of the plaintiff, and may require sureties to justify, as in actions against individuals upon bail on arrest.

326. All proceedings in actions under the provisions of this chapter, shall be conducted in the same manner as in actions against individuals, except as otherwise herein provided; and in all proceedings subsequent to the complaint, the steamer, vessel or boat, may be designated as defendant.

327. After the appearance to the action, of the owner, master, agent, or consignee, the attachment may, on motion, be discharged,

in the same manner, and on like terms and conditions, as attachments in other cases, subject to the provision of section three hundred and twenty-nine.

328. If the attachment be not discharged, and a judgment be recovered in the action in favor of the plaintiff, and an execution be issued thereon, the sheriff shall sell at public auction, after publication of notice of such sale for ten days, the steamer, vessel or boat, with its tackle, apparel and furniture, or such interest therein as may be necessary, and shall apply the proceeds of sale as follows:

1st. When the action is brought for demands other than the wages of mariners, boatmen, and others employed in the service of the steamer, vessel or boat sold, to the payment of the amount of such wages, as specified in the execution;

2d. To the payment of the judgment and costs, including his fees; and,

3d. He shall pay any balance remaining, to the owner, master, agent, or consignee, who may have appeared in the action; or if there be no appearance, then into court, subject to the claim of any party or parties legally entitled thereto.

329. Any mariner, boatman, or other person employed in the service of the steamer, vessel, or boat attached, who may wish to assert his claim for wages against the same, the attachment being issued for other demands than such wages, shall file an affidavit of his claim, setting forth the amount and the particular service rendered, with the clerk of the court; and thereafter no attachment shall be discharged upon filing an undertaking, unless the amount of such claim, or the amount determined as provided in the next section, be covered thereby, in addition to the other requirements; and any execution issued against such steamer, vessel, or boat, upon judgment recovered thereafter, shall direct the application of the proceeds of any sale: first, to the payment of the amount of such claims filed, or the amount determined, as provided in the next section, which the clerk shall insert in the writ; and second, to the payment of the judgment and costs, and sheriff's fees; and shall direct the payment of any balance to the owner, master, agent, or consignee, who may have appeared in the

action; but if no appearance by them be made therein, it shall direct a deposit of the balance in court.

330. If the claim of the mariner, boatman, or other person, filed with the clerk of the court, as provided in the last section, be not contested within five days after notice of the filing thereof, by the owner, master, agent, or consignee of the steamer, vessel, or boat against which the claim is filed, it shall be deemed admitted; but if contested, the clerk shall endorse upon the affidavit thereof a statement that it is contested, and the grounds of the contest, and shall immediately thereafter order the matter to a single referee for his determination, or he may hear the proofs and determine the matter himself. The judgment of the clerk, or referee, may be reviewed by the county judge either in term or vacation, immediately after the same is given, and the judgment of the county judge shall be final. On the review, the county judge may use the minutes of the proofs taken by the clerk, or referee, or may take the proofs anew.

331. The notice of sale published by the sheriff, shall contain a statement of the measurement and tonnage of the steamer, vessel, or boat, and a general description of her condition.

332. From orders and judgments under this chapter, an appeal may be taken by the owner, master, agent or consignee, on the same terms and conditions as appeals in actions against individuals.

TITLE IX.

OF APPEALS IN CIVIL ACTIONS.

CHAPTER I.

APPEALS IN GENERAL. (a)

333. [1854.*] A judgment or order in a civil action, except when expressly made final by this act, may be reviewed as prescribed by this title, and not otherwise.

See section 332.

1. On appeal, where the record contains no proceedings except pleadings and judgment, which were sufficient, the appellate court will hold, that sufficient evidence was adduced to warrant the judgment. *Gonzales* v. *Huntley*, 1 Cal. 32; *Palmer* v. *Brown*, ib. 42; *Ringgold* v. *Haven*, ib. 108.

2. The appellate court will presume in favor of the judgment below, unless the record clearly shows error. *Thompson* v. *Monrow*, 2 Cal. 99; *Kilburn* v. *Ritchie*, 2 Cal. 145; *Balfour* v. *Mitchell*, 12 Smc. & M. 629.

3. A judgment will not be reversed for an error by which the rights of the parties were not prejudiced. *Kilburn* v. *Ritchie*, 2 Cal. 145.

4. Appeal dismissed, where the record disclosed that the court below might or might not have granted a new trial, without impeachment of its legal discretion. *Cooks* v. *Stewart*, 2 Cal. 348.

5. An appeal lies from an order on demurrer, where a substantial right is affected. *Burgoyne* v. *Perry*, 3 Cal. 50; *Nolton* v. *Western R. R. Co.*, 10 How. Pr. 97; *Cook* v. *Pomeroy*, ib. 103.

6. An appeal will not lie from an order of court refusing to set aside an interlocutory judgment. It should be taken upon the previous order itself. *Stearns* v. *Marvin*, 3 Cal. 376; *Henley* v. *Hastings*, ib. 341.

7. An appeal cannot be taken from a mere decision on demurrer, before final judgment. *Moraga* v. *Emeric*, 4 Cal. 308; *Bentley* v. *Jones*, 4 How. Pr. 335; *King* v.

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* Statutes of 1854, 84.

(a) The provisions of this chapter shall be applicable to appeals from the probate court so far as they do not conflict with "An act to regulate the settlement of the estate of deceased persons." *Statutes* of 1855, 302, § 11; *Wood's Digest*, 422, §300.

Stafford, 5 How. Pr. 30; 6 ib. 127; *Bruce* v. *Pinckney*, 8 ib. 397; *Lewis* v. *Acker*, 8 ib. 414; *Perkins* v. *Farnham*, 10 ib. 120.

8. An appeal does not lie from an order making a new party defendant. *Beck* v. *City of San Francisco*, 4 Cal. 375.

9. An appeal does not lie from an interlocutory order. *People* v. *Thurston*, 5 Cal. 517; *Debarry* v. *Lambert*, 10 Cal. 503.

10. Interlocutory orders are appealable only in the special cases provided by law. *Baker* v. *Baker*, 10 Cal. 527.

11. Where no appeal is allowed, the proper method is to take the case up by a writ of error. *Middleton* v. *Gould*, 5 Cal. 190.

12. An appeal does not lie from an order granting a change of venue. *Jans* v. *Ingoldsby*, 6 Cal. 439.

13. Plaintiff cannot appeal from a judgment of non-suit, entered on his own motion. *Imley* v. *Beard*, 6 Cal. 666.

14. An appeal does not lie from an order refusing to grant a commission to take testimony. *People* v. *Stillman*, 7 Cal. 117.

15. No appeal is allowed from an order refusing to dissolve an injunction, nor from an order changing the place of trial. *Martin* v. *Travers*, ib. 253.

16. An appeal will not authorize a stay of an injunction. *Merced Mining Co.* v. *Fremont*, ib. 130.

17. Every intendment is in favor of a judgment of a court of record, and until the contrary is clearly shown, the appellate court is bound to suppose that it was based on proper evidence. *Grewell* v. *Henderson*, 7 Cal. 290.

18. An appeal will not lie from an order refusing to discharge an attachment until after final judgment. *Baker* v. *Rosenthall*, 7 Cal. 514.

19. An order appealable is such as would grant an affirmative relief, and where such relief is denied. *Gilman* v. *Contra Costa county*, 8 Cal. 52.

20. An appeal will lie from an order refusing to quash an execution. Ib.

21. An appeal will lie from an order of the court below changing the judgment. *Bryan* v. *Berry*, 8 Cal. 130.

22. Where an appeal is given by statute, that remedy is exclusive, and must be pursued, and a writ of error will only lie where no right to appeal is given. *Haight* v. *Gay*, 8 Cal. 297.

23. After appealing from a judgment alone, a party may appeal from an order overruling a motion for a new trial in the same case, provided the latter appeal is taken in time. Taking distinct appeals may affect the question of costs; but, subject to this condition, a party may take them, provided no delay is thereby occasioned. *Marxiou* v. *Pioche*, 8 Cal. 522.

24. An appeal will lie from an order putting a party in contempt. *Ware* v. *Robinson*, 9 Cal. 107.

25. A decree which does not ascertain any specific sum as due to any one, but contemplates the taking of a further account, is an interlocutory decree, and not a final decree. *Gray* v. *Palmer*, 9 Cal. 616.

26. Findings of a jury cannot for the first time be questioned in the supreme court,

but they must for the determination of the appeal be taken as true. *Duff* v. *Fisher*, Cal. April T. 1860.

27. Errors committed against the successful party are not noticed on appeal, but those committed against the party complaining. *Seaward* v. *Malott*, Cal. April T. 1860.

28. An order of reference is not a final order or judgment to be appealed from. *Harris* v. *Clark*, 4 How. Pr. 78.

29. An appeal from an order does not, per se, stay proceedings. *Hibbard* v. *Burwell*, 11 How. Pr. 572; *Tiers* v. *Carnahan*, 3 Abbott, 69: *Johnson* v. *Scriver*, ib. 208; *Hicks* v. *Smitt*, 4 Abbott, 285.

30. A decision, overruling a demurrer to a complaint, and giving leave to answer, is an order and not a judgment, while the privilege given to answer is continuing. *Ford* v. *David*, 13 How. Pr. 193; 3 Abbott, 385; *Phipps* v. *Van Cott*, 4 Abbott, 90.

31. The giving security on an appeal from an order does not stay proceedings of the other party. *Forbes* v. *Oaks*, 2 Abbott, 120.

334. An order made out of court, without notice to the adverse party, may be vacated or modified without notice, by the judge who made it; or may be vacated or modified on notice, in the manner in which other motions are made.

See section 25, of the judiciary act, post.

1. A court may modify an injunction on a motion *ex parte*, on giving bond, and the remedy is by appeal from the modified order. *Fremont* v. *Merced Mining Co.*, 9 Cal. 18; *Borland* v. *Thornton*, 12 Cal. 441.

2. The power conferred by this section is not substituted by the provision made in section 118, but is in addition to it. *Borland* v. *Thornton*, 12 Cal. 441.

335. Any party aggrieved may appeal in the cases prescribed in this title. The party appealing shall be known as the appellant, and the adverse party as the respondent.

1. The acceptance of costs on a motion is not waiving the right to an appeal. *Tyson* v. *Wells*, 1 Cal. 378.

2. An appeal cannot be prosecuted by a stranger to the record. *Montgomery* v. *Leavenworth*, 2 Cal. 57.

3. A party intervening, though not a party of record, may appeal from any decision affecting his rights. *Adams* v. *Woods*, 8 Cal. 306.

336. [1854, 1859.*] An appeal may be taken:

1st. From a final judgment in an action, or special proceeding, com-

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* Statutes of 1859, 189.

menced in the court in which the judgment is rendered, within one year after the rendition of the judgment;

2d. From a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of the judgment;

3d. From an order granting or refusing a new trial; from an order refusing to change the place of trial of an action or proceeding, after a motion is made therefor, in the cases provided by law, or on the ground that the judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction, *and from an order refusing to grant or dissolve an injunction*, and from any special order made after final judgment, within sixty days after the order is made and entered in the minutes of the court.

1. What is a *final*, and what is an *interlocutory* order, considered. *Loring* v. *Illsley*, 1 Cal. 24.

2. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time for them to file their bond, to entitle them to a stay of proceedings under the statute, and in the meantime order a stay of proceedings in the inferior court, until the extended period shall have expired; and in such cases the court may impose such terms as shall appear to be proper. *Bradley* v. *Hall*, ib. 199.

3. An order setting aside a report of a referee, appointed to take an account, is merely interlocutory, and not the subject of appeal before judgment. *Johnson* v. *Dopkins*, 6 ib. 83.

4. An appeal does not lie from an order refusing an injunction. *Richards* v. *McMillan*, ib. 422.

5. An appeal does not lie from an order refusing to dissolve an injunction; it should be from the granting of an injunction. *Martin* v. *Travers*, 7 ib. 253.

6. An appeal from an order granting a new trial, to be effectual, must be taken within the time allowed by statute. *Brown* v. *Tolles*, ib. 398.

7. The appellate court will review the law, but not the facts of the case, unless a new trial was demanded in the court below. Ib.

8. To hold that a new trial must be asked for, in all cases, before the error can be reviewed, would be in violation of all the settled rules of law on this subject, and would virtually make it necessary for the court below to commit the same error twice, before an appeal would lie. Ib.

9. An appeal from an order dissolving an injunction does not operate as a stay of proceedings of the cause, and counsel must be prepared to try the same when called on the calendar. *Musgrove* v. *Perkins*, 9 ib. 211.

10. The supreme court has not power to relieve a party from an omission to appeal from a judgment within the time prescribed by law. *Humphrey* v. *Chamberlain*, 1 Kern. 274.

11. An appeal from an order granting a new trial lies only when the party obtaining the verdict is content, to fail wholly in his action or defense, if he cannot sustain it. *Lannan* v. *Lewiston R. R. Co.*, 18 N. Y. 493.

12. One year limitation to bring on an appeal, begins to run from the date of the entry of the order for final judgment in the court below. *Wells* v. *Danforth*, 7 How. Pr. 197.

13. Where a party proceeds to try a cause under an order of reference, he thereby waives any right to appeal from that order. *Ubsdell* v. *Root*, 3 Abbott, 142.

337. The appeal shall be made by filing (*a*) with the clerk of the court, with whom the judgment or order appealed from is entered, a notice, stating the appeal from the same, or some specific part thereof, and serving a copy of the notice upon the adverse party or his attorney.

1. Where the object of a notice of appeal is accomplished, it is immaterial whether the notice be given or not. *McLeran* v. *Shartzer*, 5 Cal. 70; *Mokelumne Hill C. & M. Co.* v. *Woodbury*, 10 ib. 185.

2. The appeal is made by filing and serving the notice. Both are requisite, and must exist to complete the appeal. The object of the notice would be entirely defeated without service. *Franklin* v. *Renier*, 8 ib. 340; *Whipley* v. *Mills*, 9 ib. 641.

3. To constitute an appeal, the notice should be filed and served, and the undertaking filed, all within the statute time. *Hastings* v. *Halleck*, 10 ib. 31.

4. The service should be made after or at the time of filing the notice, and before or at the time of filing the affidavit. Ib.; *Buckholder* v. *Byers*, ib. 481.

338. When the party, who has the right to appeal, wishes a statement of the case to be annexed to the record of the judgment or order, he shall, within twenty days after the entry of such judgment or order, prepare such statement, which shall contain the grounds upon which he intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more, and shall serve a copy thereof upon the adverse party. The respondent may, within five days thereafter, prepare amendments to the statement, and serve a copy on the appellant. If such amendments are admitted, the statement shall be corrected accordingly; and if not admitted, the statement and amendments shall be presented to the judge who tried or heard the case, upon notice of two days to the respondent, and a true statemen shall thereupon be settled by such judge. (*b*)

(*a*.) In appeals by an incorporated city or town, or a county, the notice may be filed and served by some head of the department. *Statutes of* 1856, note (*a*), 198.

(*b*.) It shall be lawful for any district judge in the state, at any time within twelve months after the expiration of his term of office, or within twelve months after he shall, from any cause, have ceased to exercise the duties of his office, to sign and settle statements and bills of exceptions on appeal to the supreme court. *Statutes of* 1859, 220.

See statement on motion for new trial, section 195.

See rule II, of the supreme court.

1. A statement on appeal must be filed within statute time, or it forms no part of the record. *Macomber* v. *Chamberlain*, 8 Cal. 322.

2. The statement need not contain whatever is a matter of record without it. The verdict of the jury may be omitted, as it is recorded by the clerk; the finding of the court must be inserted, for it is filed with the clerk and not recorded. *Reynolds* v. *Harris*, ib. 617.

3. In a statement on appeal, the evidence, if relied upon, must be set out and not be referred to. *Dickerson* v. *Van Horn*, 9 ib. 207.

4. The amendments agreed to by counsel should be inserted in their proper place in the draft, and a fair copy of the whole made. In their separate form they do not constitute a legal statement. *Marlow* v. *Marsh*, ib. 259; *People* v. *Edwards*, ib. 286; *Skillman* v. *Riley*, 10 ib. 300.

5. Where amendments are made, a fair copy of the statement so amended should be made, otherwise the supreme court will not look into it. *Marlow* v. *Marsh*, 9 ib. 259.

6. During the term of the court, the record may become amended in any manner conformable with the facts, but when the term is past it can only be amended in case where the record itself shows error. *Branger* v. *Chevalier*, ib. 172, 351.

7. Where the statement only shows that a demurrer to a complaint was sustained, and judgment was rendered for plaintiff during the same term, the respondent should suggest a diminution of the record, in order to supply the apparent omission in the statement, or the cause will be remanded for further proceedings, the judgment being improperly rendered. *Seaver* v. *Cay*, ib. 564.

8. The substance of the testimony is all that is required to be set out in the statement. The exact language of each witness is unnecessary. *Battersby* v. *Abbott*, ib. 565.

9. The record must disclose the papers read, or evidence offered in their support, on a motion to dismiss the complaint on specified grounds. *Goodwin* v. *Glazer*, 10 ib. 337.

10. On an appeal from an order made on affidavits filed, no statement is necessary. The affidavits must be attached to the order in place of a statement, and the certificate of the clerk should specify the affidavits used; and to enable him so to do, he should at the time mark them as filed on the motion. *Paine* v. *Linhill*, ib. 337.

11. The supreme court will not examine errors assigned on appeal, where, after the service of the notice of appeal, the parties stipulated that all errors in the record, referee's report, decree and judgment, were waived. *Glotzback* v. *Foster*, 11 ib. 37.

12. The supreme court will not notice errors assigned, unless there is a properly authenticated statement. *Sherman* v. *Rollberg*, ib. 38; *Paige* v. *O'Neal*, 12 ib. 486; *People* v. *Comedo*, 11 ib. 70; *Sayre* v. *Smith*, ib. 129; *Doyle* v. *Seawall*, 12 ib. 425; *American River Water Co.* v. *Bear River Water Co.*, ib. 339; *Moore* v. *Semple*, ib. 360.

13. Where the findings support the judgment, and the record discloses no exceptions to the admission of testimony, or to any ruling of the court, the judgment below will be affirmed. *Hutchinson* v. *Ryan*, 11 ib. 142.

14. A stipulation inserted in the transcript, and not embodied in a statement or bill of exceptions, forms no part of the record which the appellate court can notice. Nor

do affidavits, used on motion to open the judgment, form any part of the record, where there is no certificate of the judge or clerk, or an admission of counsel that they were used for that purpose. *Ritter* v. *Mason*, 11 Cal. 214.

15. Transcript, on appeal to this court, should not contain irrelevant and unnecessary matter. Instead of copying into a statement for a new trial or on an appeal, deeds and transcripts of records where no point is made on the construction of the language, a brief statement of the instrument anwers every purpose. *Knowles* v. *Inches*, 12 ib. 212.

16. The grounds of a motion for a non-suit must appear in the record, otherwise the appellate court will not consider such motion. *McGarrity* v. *Byington*, ib. 426.

17. Where the questions raised by the record, on appeal to the supreme court, have been repeatedly settled by that court, or are decided by reference to plain elementary principles of law, the judgment of the court below will be affirmed with damages. *Pinkham* v. *Wemple*, ib. 449.

18. The record on appeal cannot be amended by the affidavit of the judge, setting forth that the statement is erroneous. *Smith* v. *Brannan*, Cal. Ap. T. 1859.

19. The clerk's certificate, that the statement is the same which was used on the argument of the motion for a new trial, is entitled to no weight, as the clerk is not authorized by law to verify a statement in that form. It should be agreed to by the parties or settled by the judge. *Fee* v. *Shaw*, ib.

20. The questions of law and of fact raised on appeal, must be distinctly set forth in the statement, and accompanied by so much evidence as may be necessary to explain and show their pertinency and materiality, and no more. *Barrett* v. *Tewksbury*, Cal. April T. 1860; *Reynolds* v. *Lawrence*, ib.

21. There is no distinction as to the manner in which a statement on appeal shall be prepared between a case at law and a case in equity. *Barrett* v. *Tewksbury*, ib.

22. The appellant should allege, either at the commencement or conclusion of his statement on appeal, the points upon which he will rely in his argument. Ib.

23. It is too late, after the decision of an appeal, to move for a re-settlement of the case. *Fish* v. *Wood*, 2 Abbott, 419.

339. [1855.*] If the party shall omit to make a statement within the time above limited, he shall be deemed to have waived his right thereto; and when a statement is made, and the parties shall omit, within the several times above limited, the one party to propose amendments, the other to notify an appearance before the judge, they shall respectively be deemed, the former to have agreed to the statement as proposed, and the latter to have agreed to the amendments as proposed, and no settlement of the statement, or certificate thereto by the judge, shall be required.

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* Statutes of 1855, 303.

1. If the appellant allow the time to expire, after taking the appeal, without framing a case, he waives his right to have a case stated; and a subsequent order of the court, made without notice to the respondent, allowing further time to make up the statement, is a nullity. *Leech* v. *West*, 2 Cal. 95.

2. Where a statement, to be used on appeal, is not filed within twenty days after judgment, it cannot be regarded, and the case will be determined on the judgment roll alone. *Macomber* v. *Chamberlain*, 8 ib. 322; *Karth* v. *Orth*, 10 ib. 192; *Lafferty* v. *Brownlee*, 11 Cal. 132; *McGill* v. *Rainaldi*, ib. 391; *Robinson* v. *Hudson River R. R. Co.*, 3 Abbott, 115.

340. The several periods of time above limited may be enlarged, upon good cause shown, by the judge before whom the cause was tried.

1. The time to file a statement on appeal can be extended by the court, but not by the mere act of a party in moving for a new trial. *Mahoney* v. *Caperton*, Cal. April T. 1860.

341. The statement, when settled by the judge, shall be signed by him, with his certificate that the same has been allowed and is correct; when the statement is agreed upon by the parties, they or their attorneys shall sign the same with their certificate that it has been agreed upon by them, and is correct. In either case, when settled or agreed upon, it shall be filed with the clerk.

342. The clerk shall annex the statement, if the appeal be from a final judgment, to the judgment roll; if the appeal be from an order, to such order, or to a copy thereof.

343. [1854.*] The provisions of the last five preceding sections shall not apply to appeals taken from an order made upon affidavit filed; but such affidavits shall be annexed to the order in the place of the statement mentioned in those sections.

344. Upon an appeal from a judgment, the court may review any intermediate order involving the merits, and necessarily affecting the judgment.

See notes to section 333.

1. An appeal lies from an order on demurrer, where a substantial right is affected.

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* Statutes of 1854, 84.

Burgoyne v. *Perry*, 3 Cal. 50; *Nolton* v. *Western R. R. Co.*, 10 How. Pr. 97; *Cook* v. *Pomeroy*, ib. 103.

2. An appeal cannot be taken from a mere decision on demurrer, before final judgment. *Moraga* v. *Emeric*, 4 Cal. 308; *Bentley* v. *Jones*, 4 How. Pr. 335; *King* v. *Stafford*, 5 ib. 30; 6 ib. 127; *Bruce* v. *Pinckney*, 8 ib. 397; *Lewis* v. *Acker*, 8 ib. 414; *Perkins* v. *Farnham*, 10 ib. 120.

3. An objection can be urged on appeal against an order refusing to discharge an attachment, though final judgment was had against defendants. *Taaffe* v. *Rosenthall*, 7 Cal. 514.

4. An order appealable is such as would grant an affirmative relief, and where such relief is denied. *Gilman* v. *Contra Costa county*, 8 Cal. 52.

5. A decree which does not ascertain any specific sum as due to any one, but contemplates the taking of a further account, is an interlocutory decree, and not a final decree. *Gray* v. *Palmer*, 9 ib. 616.

6. An order denying a motion to stay the trial of a cause until the decision of another cause, is not an order involving the merits, and is not reversable on the appeal from the final judgment. *James* v. *Chalmers*, 2 Seld. 209.

7. A decision, overruling a demurrer to a complaint, and giving leave to answer, is an order and not a judgment, while the privilege given to answer is continuing. *Ford* v. *David*, 13 How. Pr. 193; 3 Abbott, 385; *Phipps* v. *Van Cott*, 4 Abbott, 90.

345. Upon an appeal from a judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may set aside or confirm, or modify any or all of the proceedings subsequent to or dependent upon such judgment or order, and may, if necessary or proper, order a new trial. When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order; and when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just.

1. When it is proper, this court will render such judgment as the court below should have rendered. *Bidleman* v. *Kewen*, 2 Cal. 248.

2. After reversal of an erroneous judgment, the parties in the court below have the same rights which they originally had. *Phelan* v. *Supervisors of San Francisco*, 9 ib. 15.

3. A motion to amend the judgment of the supreme court must be made within the ten days allowed for filing a petition for rehearing. *Gray* v. *Palmer*, 11 ib. 341.

4. The supreme court will reverse the judgment below, where the facts found by the court are not sufficient to support the judgment. *Davis* v. *Caldwell*, 12 ib. 125.

5. A judgment cannot be affirmed as to a part of the amount recovered, and reversed

as to the residue, where a new trial is ordered as to the part which is reversed. *Story* v. *New York and Harlem R. R. Co.*, 2 Seld. 85.

6. Upon appeal, the judgment may be reversed as to one defendant who appeals, without affecting the judgment as to another defendant who does not appeal, in cases where a several judgment below would be proper. *Farrell* v. *Calkins*, 10 Barb. 343; *Geraud* v. *Stagg*, 10 How. Pr. 369.

346. [1854.*] On an appeal from a final judgment, the appellant shall furnish the court with a copy of the notice of appeal, the judgment roll and the statement annexed, (if there be one) certified by the clerk to be a correct copy. On appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with a copy of the notice of appeal, the judgment or order appealed from, and a copy of the papers used in the hearing of the court below; such copies to be certified by the clerk to be correct. If any written opinion be placed on file on rendering the judgment, or making the order in the court below, a copy shall be furnished. If the appellant fail to furnish the requisite papers, the appeal may be dismissed.

1. Where the respondents obtained a judgment on the 23d of December, 1851, and the appeal bond was filed on the 24th of December, and certificate of the clerk of the same court, dated February 2d, 1852, that no transcript, record, or other papers in the cause had been filed, and the affidavit of respondents was produced that the appeal was taken for delay, the court ordered the appeal to be dismissed, with ten per cent. damages and costs. *Buckley* v. *Stebbins*, 2 Cal. 149.

2. Where an appellant had failed to file a transcript of the record, showing that the appeal had been perfected, the court ordered it dismissed, with ten per cent. damages. *Pacheco* v. *Bemal*, ib. 150.

3. An appeal, which had been dismissed for failure to file the transcript in time, was reinstated upon good cause shown. *Stark* v. *Barnes*, ib. 162.

4. A case ought properly to be dismissed when the appellant has not furnished the court with a brief or abstract of the record, as the court cannot be expected to do the work of counsel. *Sims* v. *Smith*, 7 Cal. 148; *Brown* v. *Tolles*, ib. 398; *Mokelumne Hill C. and M. Co.* v. *Woodbury*, 10 ib. 185.

5. If there be no statement required, the appellate court will not dismiss for want of one. *Bryan* v. *Berry*, 8 ib. 130.

6. The appellant must show, by the certificate of the clerk, that the undertaking has been filed in due time, and if not shown to have been filed, then the respondent should make his objection by motion to dismiss, and not for the first time in his brief. *Bryan* v. *Berry*, 8 Cal. 130; *Franklin* v. *Reiner*, ib. 340.

7. A motion to dismiss appeal, on the ground that the transcript was not filed

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* Statutes of 1854, 84.

within the time required by the third rule of this court, is too late after the case has been submitted. *Cook* v. *Klink*, 8 Cal. 347.

8. An assignment of errors, is a specification of those errors upon which the appellant will rely, with such fullness as to give aid to the court in the examination of the transcript. *Squires* v. *Foorman*, 10 Cal. 298.

9. The appellate court cannot take jurisdiction of the case, unless it affirmatively appears that a copy of the notice of appeal was served. *Hildreth* v. *Gwindon*, ib. 490.

10. The time to appeal runs from the making of the final order or judgment appealed from, and not from the time of docketing the judgment roll. *Bank of Geneva* v. *Hotchkiss*, 5 How. Pr. 478; 1 Code R., N. S., 153; *Woolen Manuf. Co.* v. *Townsend*, 1 Code R., N. S., 415.

CHAPTER II.

APPEALS TO THE SUPREME COURT FROM THE DISTRICT COURTS.

See rules of supreme court, post.

347. [1854.*] An appeal may be taken to the supreme court from the district courts in the following cases:

1st. From a final judgment rendered in an action or special proceeding commenced in those courts, or brought into those courts from another court;

2d. From an order granting or refusing a new trial; from an order refusing to change the place of trial of an action or proceeding after a motion is made therefor, in the cases provided by law, or on the ground that a judge is disqualified from hearing or trying the same; from an order granting or dissolving an injunction; and from any special order made after final judgment.

See chapter I, p. 187, and references there made.

1. An appeal may be taken from a judgment of the district court, without moving for a new trial in that court. *Innis* v. *Steamer Senator*, 1 Cal. 459; *Brown* v. *Tolles*, 7 ib. 398.

2. Though the plaintiff recover less than two hundred dollars, the defendant is not entitled to an appeal. *Doyle* v. *Seawall*, 12 ib. 280.

3. Ten per cent. damages awarded by the supreme court, when the appeal was for delay. *Russell* v. *Williams*, 2 ib. 158.

4. The supreme court, in chancery cases, has full power and jurisdiction on appeal

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* Statutes of 1854, 84.

for the purpose of equity, to correct the errors of the court below, in whatever shape, or by whatever party the appeal is taken up. *Grayson* v. *Guild*, 4 Cal. 122.

5. An appeal lies from an order of injunction granted by a county judge. *Crandall* v. *Woods*, 6 ib. 449.

6. Objections to misjoinder of parties cannot be taken on appeal. *Tissot* v. *Throckmorton*, 6 ib. 471; *Tibbitts* v. *Percy*, 24 Barb. 39.

7. No appeal lies from an order refusing to dissolve an injunction, nor from an order changing the place of trial. It should have been an appeal from the order granting an injunction. *Martin* v. *Travers*, 7 Cal. 253.

8. The legislature has not the power to impair or take away the appellate jurisdiction of the court, but it has the power to prescribe the mode in which appeals may be taken. In all cases where an appeal is given by the statute, that remedy is exclusive and must be pursued. A writ of error will only lie in cases where no appeal is given by the act of our legislature. *Haight* v. *Gay*, 8 ib. 297.

9. A party cannot be permitted to prosecute two separate and distinct remedies, in the supreme court, for a review of the same questions at the same time. *Kirk* v. *Reynolds*, 12 ib. 99.

348. To render an appeal effectual for any purpose, in any case, a written undertaking shall be executed on the part of the appellant, (*a*) by at least two sureties, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, not exceeding three hundred dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking shall be filed, or such

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(*a*) STATUTES OF 1856, 26.

An act concerning Appeals in certain cases. Passed Feb. 14, 1856.

1. When judgment has been rendered in the court of a justice of the peace, in a county court, a district court, against any organized or incorporated city or town in this state, said city, or town, or county, against which such judgment was rendered, may appeal therefrom to any court of competent jurisdiction, by filing a notice of appeal with the said justice of the peace, or clerk of either of the other courts, as above mentioned, and serving a copy thereof on the opposite party, or his attorney, within the time and manner provided for appeals in other cases; and said appeals shall be effectual for all purposes, and shall operate as a *supersedeas* to any execution that has been or may be issued on said judgment, without the filing of a bond, or the payment of costs to the justice, or other courts, by the said city, or town, or county so appealing.

2. The mayor, attorney, or chief officer of any city, or district attorney, or the president of the board of supervisors of any county, shall have power to give the notice herein required to be given, and to perfect such appeal on behalf of their respective corporations or counties. *People* v. *the Supervisors of Marin county*, 10 Cal. 344.

deposit made, with the clerk within five days after the notice of appeal is filed.

1. The omission of the words "to pay to" will not invalidate the obligation of an appeal bond. *Billings* v. *Roadhouse*, 5 Cal. 71.

2. If an appeal be dismissed for want of a proper bond, the party can appeal again, within statute time. *Martinez* v. *Gallardo*, ib 155.

3. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must also have an assignment of the bond. *Moses* v. *Thorne*, 6 ib. 87.

4. Where an appeal is withdrawn, or dismissed by consent, no action can be maintained on the appeal bond. *Osborn* v. *Hendrickson*, ib. 175.

5. An appeal bond does not impair the lien, and is no substitution of the security. *Low* v. *Adams*, ib. 277.

6. Where a mere defective undertaking has been given *bona fide*, and the appellant will file a good one in proper time, it shall be permitted; but where no undertaking has been executed, the party will not be allowed to file one. *Bryan* v. *Berry*, 8 ib. 130.

7. The bond need not be executed by the appellant, but only in his behalf. *Curtis* v. *Richards*, 9 ib. 33; *Tissot* v. *Darling*, ib. 278.

8. If the judgment in the district court be for less than $200, the district court can have no jurisdiction in an action on the bond. *Page* v. *Ellis*, ib. 248.

9. In a suit on an appeal bond, it is unnecessary to aver that execution had been issued on the judgment and returned unsatisfied. The non-payment of the judgment can be shown without issuing an execution. *Tissot* v. *Darling*, ib. 278.

10. An undertaking wherein the sureties justify in double the sum of $300, but less than double the sum of the judgment, is sufficient for an appeal, but not to stay execution. *Mokelumne Hill C. & M. Co.* v. *Woodbury*, 10 ib. 185.

11. Until an appeal is taken, there is nothing to give effect to the undertaking. *Buckholder* v. *Byers*, ib. 481.

12. Where, in an action on a bond to pay the judgment appealed from, if the same should be affirmed by the appellate court, it appeared that the judgment appealed from was reversed, with directions to enter a different judgment: held, that the conditions of such bond were not broken, and that no action would lie thereon. *Chase* v. *Ries*, ib. 517.

13. There is no necessity for any mention of the names of the stipulators in the body of the bond to make it obligatory. The signatures sufficiently indicate who executed. *Dore* v. *Covey*, Cal. Ap. T. 1859.

14. The stay of execution is a sufficient consideration to take the case out of the statute of frauds. Ib.

15. The obligee of the bond can waive any irregularity as to the residence, statutory amount, &c., without vitiating the same. Ib.

16. The appellant is not responsible for the consequences of misfortune and insolvency of his sureties after the the appeal is perfected. *Willett* v. *Stringer*, 15 How. Pr. 310.

17. Giving security on an appeal from an order does not stay proceedings of the other party. *Forbes* v. *Oaks*, 2 Abbott, 120.

18. It is no defense to an action on this undertaking, given by several defendants, that all but one abandoned the appeal. It is sufficient to render the sureties liable if prosecuted by one, and the judgment be affirmed. *Burrall* v. *Vanderbilt*, 6 Abbott, 70.

19. If the undertaking substantially complies with the statute, and secures to the respondent all the law designed for him, it is sufficient. *Coleman* v. *Rowe*, 4 Sme. & M. 747; *Smith* v. *Norval*, 2 Code R. 14.

20. An appeal is perfected when the proper undertaking, with affidavit of sureties, has been executed, and notice of the appeal has been served on the adverse party, and on the clerk with whom the judgment or order was entered. *Thompson* v. *Blanchard*, 4 How. Pr. 210.

349. If the appeal be from a judgment or order directing the payment of money, it shall not stay the execution of the judgment or order unless a written undertaking be executed, on the part of the appellant, by two or more sureties, stating their places of residence and occupation, to the effect that they are bound in double the amount named in the judgment or order, that if the judgment or order appealed from, or any part thereof, be affirmed, the appellant shall pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order shall be affirmed, if affirmed only in part; and all damages and costs which shall be awarded against the appellant upon the appeal.

1. A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done; it does not reach a case of injunction. *Merced Mining Co.* v. *Fremont*, 7 Cal. 131.

2. This bond will be so construed as to carry out the obvious intentions of the parties. *Swain* v. *Graves*, 8 Cal. 549.

3. If the sureties fail to justify in the amount necessary, and the undertaking does not state the places of residence and occupation of the sureties, it may be insufficient to stay execution; nevertheless it will be sufficient under the previous section to effect an appeal, and the appeal cannot be dismissed. *Dobbins* v. *Dollarhide*, Cal. April T. 1860.

4. A judgment directing the payment of money out of a fund in court, is not a judgment directing the payment of money, within this section. *Curtis* v. *Leavitt*, 10 How. Pr. 481; 1 Abbott, 274.

350. If the judgment or order appealed from direct the assignment or delivery of documents, or personal property, the execution of the judgment or order shall not be stayed by appeal, unless the things required to be assigned or delivered be placed in the custody of such officer or receiver as the court may appoint; or unless an undertaking be entered into, on the part of the appellant, with at least two sureties,

and in such amount as the court or the judge thereof, or county judge, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

351. If the judgment or order appealed from direct the execution of a conveyance or other instrument, the execution of the judgment or order shall not be stayed by the appeal, until the instrument is executed and deposited with the clerk, with whom the judgment or order is entered, to abide the judgment of the appellate court.

352. If the judgment or order appealed from direct the sale, or delivery of possession of real property, the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

353. Whenever an appeal is perfected, as provided by the preceding sections in this chapter, it shall stay all further proceedings in the court below, upon the judgment or order appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action, and not affected by the judgment or order appealed from. And the court below may, in its discretion, dispense with, or limit the security required by said sections, when the appellant is an executor, administrator, trustee, or other person acting in another's right.

354. The undertaking prescribed by sections three hundred and forty-eight, three hundred and forty-nine, three hundred and fifty, and

three hundred and fifty-two, may be in one instrument, or several, at the option of the appellant.

355. [1854.*] An undertaking upon an appeal shall be of no effect unless it be accompanied by the affidavit of the sureties, that they are each worth the amount specified therein over and above all their just debts and liabilities, exclusive of property exempt from execution, except where the judgment exceeds three thousand dollars, and the undertaking on appeal is executed by more than two sureties, they may state on their affidavit that they are severally worth amounts less than that expressed in the undertaking, if the whole amount be equivalent to that of two sufficient sureties. The adverse party may, however, except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before a judge of the court below, or a county judge, or the county clerk, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no such undertaking had been given, and in all cases where an undertaking is required on appeal by the provisions of this chapter, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking, and in all cases the undertaking or deposit may be waived by the written consent of the respondent.

1. On an application for justification of sureties on an appeal, the merits of the appeal will not be considered. *Bradley* v. *Hall*, 1 Cal. 199.

2. A failure to justify when they are excepted to, leaves the appeal as though no undertaking had been filed, and ineffectual for any purpose. *Lower* v. *Knox*, 10 Cal. 480.

3. Where the sureties on an undertaking failed to justify after notice of exception to their sufficiency, according to the code, but did justify without notice to the adverse party: held, to be insufficient, and the appellant was required within ten days to file a new undertaking and justify thereto, upon proper notice to respondent, and stipulate to submit the appeal on briefs. *Stark* v. *Barrett*, Cal. April T. 1860.

4. The benefit of an exception duly taken to sureties is waived by a failure of the respondent to attend the officer before whom notice of justification is given, although the sureties also fail to attend. *Ballard* v. *Ballard*, 18 N. Y. 491.

5. That the undertaking be approved, is an important feature in perfecting an appeal. *Wade* v. *Am. Col. Soc.*, 4 Sme. & M. 670.

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* Statutes of 1854, 84.

6. The exception should be to "sureties," and not to the undertaking. *Young* v. *Colby*, 2 Code R. 68.

7. The sureties need only justify to double the amount of the judgment. *Rick* v. *Beekman*, 2 Code R. 63.

356. In cases not provided for in sections three hundred and forty-nine, three hundred and fifty, three hundred and fifty-one, and three hundred and fifty-two, the perfecting of an appeal, by giving the undertaking, and the justification of the sureties thereon, if required, or making the deposit mentioned in section three hundred and forty-eight, shall stay proceedings in the court below upon the judgment or order appealed from; except that where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited, to abide the judgment of the appellate court.

357. [1854.*] Appeals in the supreme court may be brought to a hearing by either party, upon a notice of three days to the opposite party. Before the argument, each party shall furnish to the other, and each of the justices, a copy of his points and authorities, or either party may file one copy thereof with the clerk, who shall cause the requisite copies to be made.

1. When appellant notices case for argument, respondent may affirm the judgment, *ex parte*, although he gave no notice. *Constant* v. *Ward*, 1 Cal. 333.

2. Where counsel consent to submit a cause on two grounds only, they will not be allowed to insist on other points not mentioned in the stipulation. *Cahoon* v. *Levy*, 10 Cal. 216.

3. Where appellant assigns no errors, the judgment will be affirmed. *People* v. *Goldbury*, 10 Cal. 312.

358. When judgment is rendered upon the appeal, it shall be certified by the clerk of the supreme court to the clerk with whom the judgment roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed shall attach the certificate to the judgment roll, and enter a minute of the judgment of the supreme court on the docket against the original entry. In cases of an appeal from the order, the clerk shall enter at

* Statutes of 1854, 84.

length in the records of the court the certificate received, and minute against the entry of the order appealed from, a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified, as the case may be, by the supreme court, on appeal.

See sections 657 and 665.

1. Where a remittitur is sent down, the clerk of the district court may issue execution for costs. *Mayor of the City of Marysville* v. *Buchanan*, 3 Cal. 212.

2. A judgment "of reversal" in the supreme court is not necessarily a bar to further proceedings in the action. The opinion rendered with the judgment is advisory to the court below; and after the reversal of an erroneous judgment, the parties have the same rights which they had originally. *Stearns* v. *Aguirre*, 7 Cal. 443.

3. Where a judgment is rendered in the appellate court, reversing the judgment of the court below, and remanding the case for further proceedings, it becomes the law of the case, and it must be adhered to, though erroneous. *Gunter* v. *Laffan*, 7 Cal. 588.

4. Where a remittitur is sent down and direct the entry of a final judgment, such judgment can be entered by the clerk of the district court in vacation. *McMillan* v. *Richards*, 12 Cal. 467.

5. After a cause has been regularly remitted to the court below, the appellate court has no jurisdiction to grant relief. The only remedy is a new appeal. *Fraser* v. *Western*, 3 How. Pr. 235; *Dresser* v. *Brooks*, 4 How. Pr. 207.

CHAPTER III.

APPEALS TO THE SUPREME COURT FROM THE COUNTY COURT.

1. The appellate jurisdiction of district courts held unconstitutional. *People* v. *Peralta*, 3 Cal. 379; *Caulfield* v. *Hudson*, 3 Cal. 389; *Hernandez* v. *Simon*, 3 Cal. 464; *Reed* v. *McCormick*, 4 Cal. 342; *Townsend* v. *Brooks*, 5 Cal. 52.

359. [1853, 1854.*] An appeal may be taken to the supreme court from a judgment of the county court, in all cases where the amount in dispute exceeds two hundred dollars, or where the legality of any tax, toll or impost, or municipal fine, is in question.

1. Though the plaintiff recover less than two hundred dollars, the defendant is entitled to an appeal, if the costs added to the judgment exceed two hundred dollars. *Gordon* v. *Ross*, 2 Cal. 156; overruled in *Hildreth* v. *Gwindon*, Cal. April T. 1859.

2. An appeal may be taken to the supreme court from an order granting or refusing

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* Statutes of 1854, 84.

a new trial in a contested election before a county judge, under the provisions of the act regulating elections. *Dickinson* v. *Van Horn*, 9 Cal. 207.

3. The supreme court has jurisdiction to hear and determine appeals from the judgment of a county court on questions of fraud made on the petition of an insolvent for a discharge from his debts. *Fisk* v. *His Creditors*, 12 Cal. 281.

360. [1854.*] Security shall be given upon such appeal in the same manner and to the same extent as upon an appeal to the supreme court from the district court, and like justification on the part of the sureties may be required.

361. [1854.*] Appeals from the county courts shall be brought to a hearing in the same manner, and upon like notice, as appeals from the district court.

362. [1853, 1854.*] The appellant shall furnish the papers for the supreme court, in the same manner as upon appeals from the district court.

CHAPTER IV.

APPEALS TO THE DISTRICT COURTS FROM THE PROBATE COURTS.

1. The appellate jurisdiction of the district court declared unconstitutional. See notes, chapter III, p. 204.

2. Issues made in the probate courts are certified to, and are to be tried in the district courts, from which appeals lie to the supreme court. See statute cited in note (*a*).

363. An appeal (*a*) may be taken from a probate court to the

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* Statutes of 1854, 84.

(*a*) STATUTES OF 1855, 301; WOOD'S DIGEST, 421, ART. 2354.

297. An appeal may be taken to the supreme court from an order, decree or judgment of the probate court, where the estate or amount in dispute exceeds two hundred dollars, in the following cases:

1st. For, or against granting or revoking letters testamentary or of administration;

2d. For, or against admitting a will to probate;

3d. For, or against the validity of a will, or revoking the probate thereof;

4th. For, or against setting apart property, or making an allowance for a widow or child;

district court of the district in which the probate court is held, in the following cases:

1st. From an order or decree admitting a will to probate, or refusing the same;

2d. From an order setting apart property, or making an allowance for the widow or children;

3d. From an order granting letters testamentary or of administration, or appointing a guardian of an infant, or of an insane person,

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5th. For, or against directing the sale or conveyance of real property;

6th. On the settlement of an executor or administrator;

7th. For, or against declaring, allowing or directing the payment of a debt, claim, legacy or distributive share.

298. The appeal may be taken within sixty days after the order, decree or judgment is made and entered in the minutes of the court; it shall be made by filing with the clerk of the probate court, a notice stating the appeal from the order, decree or judgment, or some specific part thereof, and by executing an undertaking, or giving surety, on such appeal in the same manner, and to the same extent, as upon an appeal to the supreme court from the district court; provided, the appeal of an executor or administrator who has given an official bond, shall be complete and effectual without the undertaking; provided also, from an order, decree or judgment, made since the first day of October, eighteen hundred and fifty-four, the appeal may be taken within sixty days after the passage of this act. After the appeal is determined, suit may be brought and prosecuted to judgment on the undertaking, in the name of any party beneficially interested therein.

299. When a party who has a right to appeal, wishes a statement of the case to be annexed to the record, he shall prepare and file the same within twenty days after the entry of the order, decree or judgment; provided, if the order, decree, or judgment has been made since the first day of October, eighteen hundred and fifty-four, he shall prepare and file such statement within twenty days after the passage of this act.

300. The provisions as amended, of chapter 1, title IX, of the act entitled "an act to regulate proceedings in civil cases in the courts of justice in this state," passed April 29, 1851, so far as the same do not conflict with the provisions of this act, shall be applicable to appeals from the probate court.

301. When an issue is certified for trial, the clerk of the probate court shall transmit all papers and records, necessary for the trial of the issue, to the district court; after such trial, the clerk of the district court shall return the same, with the proceedings of the court, to the probate court.

302. Where it is not otherwise prescribed by law, the probate court or the supreme court, on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the estate, as justice may require; executions for the costs may issue out of the probate court.

or of a person incompetent to manage his property, or refusing to grant such letters, or to make such appointment, or making such letters or appointment;

4th. From an order directing the sale or conveyance of real property;

5th. From an order or decree by which a debt, claim, legacy, or distributive share is allowed, or payment thereof directed; or by which such allowance or direction is refused;

6th. From an order made on the settlement of an executor, administrator or guardian.

364. The appeal shall be taken within thirty days after the order or decree appealed from is entered with the clerk.

365. [1854.*] Appeals from the probate court shall be brought to a hearing at the earliest period practicable. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the district court may order the appeal dismissed.

CHAPTER V.

APPEALS TO THE COUNTY COURTS FROM JUSTICES' AND RECORDERS' COURTS.

366. [1853, 1854.*] Judgments in all civil cases rendered by justices', recorders' and mayors' courts, may be reviewed by the county court; when the appeal is taken on questions of law alone, it shall be heard on a statement of the case prepared as prescribed in title XVI of this act. When the appeal is taken on questions of fact, or on questions of both law and fact, the action shall be tried anew in the county court, and either party may, on such trial, demand a jury.

1. Where both parties appear, no notice of appeal is necessary to be shown. *McLeran* v. *Shartzer*, 5 Cal. 70.

2. The county court, where an appeal bond is defective, should give leave to file a good bond. *Billings* v. *Roadhouse*, ib. 71.

3. The trial on appeal in county courts must be de novo, and the judgment of the justice's court cannot be reversed for error. *Coyle* v. *Baldwin*, ib. 75.

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* Statutes of 1854, 84.

4. A sufficient excuse for failing to produce an appeal bond will be heard by the court, and if admitted, a bond may be allowed to be filed. *Howard* v. *Harman*, 5 Cal. 78.

5. In an appeal notice, the words "whole judgment" are sufficiently definite. *Price* v. *Van Caneghan*, ib. 123.

6. The county court has no jurisdiction to enforce a mechanic's lien, where the amount in controversy exceeds two hundred dollars. *Brack* v. *Bruce*, ib. 279.

7. Where the judgment of the court below exceeds in amount the jurisdiction, the county court, on appeal, should dismiss the whole case. *Ford* v. *Smith*, ib. 331.

8. The power of the county court to treble damages by way of penalty, in actions of forcible entry, results by implication from a power to try de novo. *O'Callaghan* v. *Booth*, 6 ib. 63.

9. Where a motion is made in the county court to dismiss an appeal, on the ground that the undertaking filed is insufficient, and before the determination thereof, the other party offers to amend his undertaking: held, that it is error to refuse to allow him so to do. *Cunningham* v. *Watkins*, 8 ib. 33.

10. If the appeal be on points of law alone, and a new trial be granted, it shall be had in the county court after a reasonable time. *People* v. *Freelon*, 8 ib. 517.

367. [1854.*] Upon an appeal heard upon a statement of the case, the county court may review all orders affecting the judgment appealed from, and may set aside, or confirm, or modify any or all of the proceedings subsequent to, or dependent upon, said judgment; and may, if necessary or proper, order a new trial. When the action is tried anew, on appeal, the trial shall be conducted in all respects, as trials in the district court. The provisions of this act, as to changing the place of trial, and all the provisions as to trials in the district court, shall be applicable on trials on appeal in the county court. For a failure to prosecute an appeal, or unnecessary delay in bringing it to a hearing, the county court, after notice, may order the appeal to be dismissed. Judgments rendered in the county court on appeal, shall have the same force and effect, and be enforced in the same manner, as judgments in actions commenced in the district court.

See sections 624, 629, 640.

1. A defendant who has been properly served with process, issued out of a justice's court, who allows judgment to be taken against him by default, admits the facts alleged in the complaint, and no appeal will lie from such judgment. *People* v. *County Court of El Dorado county*, 10 Cal. 19; *Funkenstein* v. *Elgutter*, 11 ib. 328.

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* Statutes of 1854, 84.

TITLE X.

MISCELLANEOUS PROCEEDINGS.

CHAPTER I.

PROCEEDINGS AGAINST JOINT DEBTORS.

368. When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding, as provided in section thirty-two, those who were not originally served with the summons, and did not appear in the action, may be summoned to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons.

See section 32.

1. In a suit against partners, judgment can be taken only against those served with process. *Ingraham* v. *Gildemeester*, 2 Cal. 88.

2. When some of the defendants are not served with process, the plaintiff may proceed against those served. Ib.

3. A covenant not to sue made to a portion only of joint debtors, does not release any of them. *Matthey* v. *Gally*, 4 ib. 62.

4. In an action against two defendants on a joint and several obligation, the entry of a final judgment on default against one is the discharge of the other. *Stearns* v. *Aguirre*, 6 ib. 176.

5. A release of one joint debtor is a release of the other; but it must be a technical release under seal. *Armstrong* v. *Hayward*, ib. 183.

6. A personal judgment cannot be given against a party not served with process, in an action on a joint obligation of several defendants. *Treat* v. *McCall*, 10 ib. 50.

7. In such a proceeding, does the cause of action or right to proceed arise upon judgment or the original demand? *Oakley* v. *Aspinwall*, 4 Coms. 513.

369. The summons, as provided in the last section, shall describe the judgment, and require the person summoned to show cause why he should not be bound by it, and shall be served in the same manner, and returnable within the same time, as the original summons. It shall not be necessary to file a new complaint.

370. The summons shall be accompanied by an affidavit of the plaintiff, his agent, representative, or attorney, that the judgment, or some part thereof, remains unsatisfied, and shall specify the amount due thereon.

371. Upon such summons, the defendant may answer within the time specified therein, denying the judgment, or setting up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the statute of limitation.

372. If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer, shall constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the original complaint and judgment, the summons with the affidavit annexed, and the answer, shall constitute such written allegations.

373. The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon.

CHAPTER II.

CONFESSION OF JUDGMENT WITHOUT ACTION.

374. A judgment by confession may be entered without action, either for money due, or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

1. A junior judgment creditor must resort to a court of equity if he is dissatisfied with the bona fides of the confession of judgment. *Arrington* v. *Sherry*, 5 Cal. 513.

2. A judgment confessed for the purpose of hindering, delaying or defrauding creditors, is void as to such creditors. *Ryan* v. *Daly*, 6 ib. 238.

3. The court may set aside a judgment entered therein, for a defect in the statement

upon which it is entered, on the application of a junior judgment creditor. *Chappel* v. *Chappel*, 2 Kern. 215.

4. A public officer who is liable to be sued for services rendered for the public, at his request may confess a judgment in his official capacity, for the amount. *Gere* v. *Supervisors of Cayuga county*, 7 How. Pr. 255.

5. A judgment confessed by one partner, in the name of himself and his copartner, is void as to his copartner. *Stoutenburg* v. *Vandenburgh*, ib. 229; *Everson* v. *Gehrman*, 10 ib. 301; *Bridenbecker* v. *Mason*, 16 ib. 203; *Morgan* v. *Richardson*, 16 Mo. 409.

6. On a judgment by confession there is no suit, no recovery or adjudication, until the judgment is entered by the clerk; and this act not only creates the lien, but the judgment. *Blydenburgh* v. *Northrup*, 13 How. Pr. 289.

7. Whether a person not a direct party to a confessed judgment, but complaining of its injurious operation, shall be heard summarily on informal affidavits, or be put to the more tedious remedy by a bill in equity, depends upon the particular circumstances in each particular case, to be judged of after the affidavits on both sides have been read. The usual course has been to grant the same relief on motion, as might be obtained on formal suit. *Lowber* v. *Mayor of New York*, 5 Abbott, 325, 484.

375. A statement in writing shall be made, signed by the defendant, and verified by his oath to the following effect:

1st. It shall authorize the entry of judgment for a specified sum;

2d. If it be for money due, or to become due, it shall state concisely the facts out of which it arose, and shall show that the sum confessed therefor is justly due, or to become due;

3d. If it be for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and shall show that the sum confessed therefor does not exceed the same.

1. The failure to make all the disclosures in the statement is prima facie evidence of fraud, and must be explained. *Richards* v. *McMillan*, 6 Cal. 419.

2. All the facts out of which the indebtedness arose, should be concisely stated in the statement on confession of judgment. *Chappel* v. *Chappel*, 2 Kern. 215; *Dunham* v. *Waterman*, 17 New York, 9; *Gandal* v. *Finn*, 23 Barb. 652; 13 How. Pr. 418; *Plummer* v. *Plummer*, 7 ib. 62; *Borden* v. *Johnson*, 11 ib. 503; *Hoppock* v. *Donaldson*, 12 ib. 141; *Stebbins* v. *East Society of the M. E. Church*, ib. 410; *Healey* v. *Preston*, 14 ib. 20; *Bank of Kinderhook* v. *Jenison*, 15 ib. 41; *Beakman* v. *Kirk*, ib. 228; *Fresligh* v. *Brink*, 16 ib. 272; *Thompson* v. *Van Vechten*, 5 Abbott, 453; *Neusbaum* v. *Keim*, 7 ib. 23; *Kendall* v. *Hodgkins*, ib. 309; 1 Bosworth, 659.

3. The statement in writing must show that the sum confessed is justly due. *Schoolcraft* v. *Thompson*, 7 How. Pr. 446.

4. A statement for confession of judgment which recites generally that the judgment was for goods sold and delivered, or on a note given for goods sold and delivered, is insufficient. *Von Beck v. Shuman*, 13 ib. 472; *Moody* v. *Townsend*, 3 Abbott, 375.

5. A court has no power to allow an amendment of an insufficient statement and confession of judgment, so as to render the judgment entered upon it valid, as against intervening bona fide purchasers or incumbrancers. *Hammond* v. *Bush*, 8 Abbott, 152.

376. The statement shall be filed with the clerk of the county in which the judgment is to be entered, who shall endorse upon it, and enter in the judgment book a judgment of such court, for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment endorsed, shall thereupon become the judgment roll.

1. The court will not allow a party to suffer by the omission or mistake of a clerk, attorney or officer of the court, where a substantial right is involved, on a confession of judgment. *Neale* v. *Berryhill*, 4 How. Pr. 16.

CHAPTER III.

SUBMITTING A CONTROVERSY WITHOUT ACTION.

377. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction, if an action had been brought. But it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment thereon, as if an action were depending.

1. It is a general rule that the court will not entertain a fictitious case, to test a right to a particular thing. *Port Gibson Bank* v. *Dickson*, 4 Sme. & M. 689; *Brewington* v. *Lowe*, 1 Ind. (Carter) 21.

378. Judgment shall be entered in the judgment book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment, shall constitute the judgment roll.

379. The judgment may be enforced in the same manner as if it had been rendered in an action, and shall be in the same manner subject to appeal.

CHAPTER IV.

OF ARBITRATIONS.

380. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification shall not include questions relating merely to the partition or boundaries of real property.

1. A reference may be an arbitration, and the report thereon an award. *Blunt* v. *Whitney*, 3 Sand. 4.

381. The submission to arbitration shall be in writing, and may be to one or more persons.

See section 529.

1. Submission to arbitration discontinues a suit. A consent to submit to arbitration does not authorize an entry of judgment. *Gunter* v. *Sanchez*, 1 Cal. 45.

382. It may be stipulated in the submission, that it be entered as an order of the county court, or of the district court, for which purpose it shall be filed with the clerk of the county where the parties, or one of them, reside. The clerk shall, thereupon, enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award shall be made. When so entered, the submission shall not be revoked without the consent of both parties. The arbitrators may be compelled by the court to make an award, and the award may be enforced by the court, in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

383. Arbitrators shall have power to appoint a time and place for hearing, to adjourn from time to time, to administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon.

1. Arbitrators are not bound to decide according to law. *Muldrow* v. *Norris*, 2 Cal. 74; *Peachey* v. *Ritchie*, 4 ib. 205; *Carsley* v. *Lindsey*, Cal. Oct. T. 1859.

2. Where parties refer all differences to arbitration, it is the duty of the arbitrators to pass upon the whole subject in controversy, and if it appear upon the face of the award that they have not disposed of the whole matter, but have left a part open, or if the terms of the award be such as to render a further inquiry necessary to ascertain a sum of money to be paid or some act to be done, it is void, and will be set aside. *Porter* v. *Scott*, 7 Cal. 312.

3. If the amount involved be over two hundred dollars, it cannot be entered as an order of the county court. *Williams* v. *Walton*, 9 ib. 142.

4. Where witnesses were examined without being sworn, and no objection taken thereto, it will be presumed the parties assented thereto. *Beryh* v. *Pfeiffer*, Lalor's Sup. 110.

5. When an arbitrator exceeds his authority, the effect of his act is void, whether done conscientiously or by mistake. *Burrowe* v. *Milbank*, 5 Abbott, 28.

384. All the arbitrators shall meet and act together during the investigation; but when met, a majority may determine any question. Before acting, they shall be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties, in relation to the matters in controversy, and to make a just award, according to their understanding.

385. The award shall be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. When the submission is made an order of the court, the award shall be filed with the clerk, and a note thereof made in his register. After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit, showing that notice of filing the award has been served on the adverse party or his attorney, at least four days prior to such application, and that no order staying the entry of judgment has been served, the award shall be entered by the clerk in the judgment book, and shall thereupon have the effect of a judgment.

1. Where the arbitration is to end litigation, and becomes uncertain and incomplete, it must be set aside. *Pierson* v. *Norman*, 2 Cal. 399.

2. The statute must be pursued in the manner in which the submission is filed with the clerk, and the motion made for judgment on the award. *Heslep* v. *City of San Francisco*, 4 ib. 1; *Carsley* v. *Lindsey*, Cal. Oct. T. 1859.

3. An award rendered upon a fair arbitration and concurred in, is conclusive. *Jarvis* v. *Fountain Water Co.*, 5 ib. 179.

4. A valid award made by an arbitrator upon a cause of action, is a bar to a suit thereon, although the award has not been performed. *Brazill* v. *Isham*, 2 Kern. 9.

5. An award which leaves nothing to be done, to dispose of the whole matter in controversy, except mere ministerial acts, is sufficiently certain and final. *Owen* v. *Boerum*, 23 Barb. 187.

386. The court, on motion, may vacate the award upon either of the following grounds, and may order a new hearing before the same arbitrators, or not, in its discretion:

1st. That it was procured by corruption or fraud;

2d. That the arbitrators were guilty of misconduct, or committed gross error in refusing, on cause shown, to postpone the hearing, or in refusing to hear pertinent evidence, or otherwise acted improperly, in a manner by which the rights of the party were prejudiced;

3d. That the arbitrators exceeded their powers in making their award; or that they refused, or improperly omitted, to consider a part of the matters submitted to them; or that the award is indefinite, or cannot be performed.

387. The court may, on motion, modify or correct the award where it appears:

1st. That there was a miscalculation in figures, upon which it was made, or that there is a mistake in the description of some person, or property therein;

2d. When a part of the award is upon matters not submitted, which part can be separated from other parts, and does not affect the decision on the matters submitted;

3d. When the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

1. Awards must be set aside for fraud, mistake or accident. An award may be enforced for the good part, and set aside for the bad. *Muldrow* v. *Norris*, 2 Cal. 74; *Tyson* v. *Wells*, ib. 122.

388. The decision upon the motion shall be subject to appeal in the same manner as an order which is subject to appeal in a civil action; but the judgment entered before a motion is made, shall not be subject to appeal.

1. A stipulation that neither party will appeal, is not binding. *Muldrow* v. *Norris*, 2 Cal. 74.

389. If a submission to arbitration be revoked, and an action be brought therefor, the amount to be recovered shall only be the costs and damages sustained in preparing for and attending the arbitration.

CHAPTER V.

OFFER OF THE DEFENDANT TO COMPROMISE THE WHOLE OR A PART OF AN ACTION.

390. The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him, for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the summons, complaint and offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he shall not recover costs, but shall pay the defendant's costs, from the time of the offer.

1. A cognovit is good as an admission in pais after answer is filed. *Hirschfield* v. *Franklin*, 6 Cal. 607.

2. An offer in writing to allow judgment, signed by the attorney, is equivalent to an offer signed by the defendant. *Sterne* v. *Bently*, 3 How. Pr. 331; 1 Code R. 109.

3. A defendant against whom a judgment is obtained for a less amount than he offered in writing to allow judgment to be taken against him, is entitled to costs against the plaintiff from the time of the offer. *M'Lees* v. *Avery*, 4 How. Pr. 441.

4. A plaintiff has in all cases five days to elect whether he will accept or proceed to trial. If notice is served so that the cause is reached and tried before the expiration of the five days, the rights of the parties are in all respects as if no offer had been made. *Pomeroy* v. *Hulin*, 7 ib. 161.

5. Where the plaintiff failed to obtain a more favorable judgment in amount than was offered by defendant, but on the trial extinguished a set-off of the defendant, which with the verdict exceeded the defendant's offer, the plaintiff was entitled to full costs. *Ruggles* v. *Fogg*, ib. 324.

6. The offer amounts to a written stipulation on the part of the defendant; and precludes him from taking any steps in the cause until the five days expire, or the written notice of acceptance be served. *Walker* v. *Johnson*, 8 ib. 240.

7. The offer under the code, is analogous to the cognovit under the former practice. *Emery* v. *Emery*, 9 How. Pr. 130; *Johnson* v. *Sagar*, 10 ib. 552; *Lippman* v. *Joelson*, 1 Code, N. S., note, 161.

8. One defendant, a joint debtor, served with process, may by this offer bind his co-defendant not served, as to the joint property. *Emery* v. *Emery*, 9 How. Pr. 131.

9. The offer will not be avoided by serving an amended answer. *Kilts* v. *Seeber*, 10 ib, 270.

10. One copartner cannot, against the explicit objections and known wishes of his copartner, and in collusion with the plaintiff, offer to allow a judgment which will be binding and regular upon his copartner. *Everson* v. *Gehrman*, 10 How. Pr. 301; 1 Abbott, 167; *Binney* v. *Legal*, ib. 283; 19 Barb. 592.

11. There should be no doubtful language or misunderstanding about the offer. *Post* v. *New York Central R. R. Co.*, 12 ib. 552.

12. An offer need not be made for a specific sum; where the offer was for judgment in the amount claimed less the set-offs in the defense, it was deemed sufficient to recover costs. *Burnett* v. *Westfall*, 15 How. Pr. 420, 430.

13. That the defendant offered to let the plaintiff take judgment for a sum admitted in the answer to be due, which offer plaintiff declined, is no reason for denying plaintiff's motion, that defendant pay into the court the sum admitted to be due. *Dusenberry* v. *Woodward*, 1 Abbott, 443.

TITLE XI.

OF WITNESSES, AND OF THE MANNER OF OBTAINING EVIDENCE.

CHAPTER I.

OF WITNESSES.

391. All persons, without exception, otherwise than as specified in this chapter, may be witnesses in any action or proceeding.

1. The court should decide upon the admissibility of a witness, and not refer the question to the jury. *Tabor* v. *Staniels*, 2 Cal. 240.

2. A book-keeper, as a witness, has a right to refer to the books kept by him, to refresh his memory. *Treadwell* v. *Wells*, 4 ib. 260.

3. The account book of a tradesman, in general, is not admissible to prove a charge for money loaned, yet where it was shown that plaintiff had procured and paid for certain articles for defendant, and charged it as money loaned, the book is admissible. *Le Franc* v. *Hewitt*, 7 ib. 186.

4. Where evidence offered to be given as a defense to the action, is excluded by the court on the ground that it is not warranted by the pleadings, the party should offer it again in mitigation of damages, if he wishes to avail himself of it for that purpose. *Travis* v. *Barger*, 26 Barb. 615.

392. [1854.*] No person offered as a witness shall be excluded on account of his opinions on matters of religious belief; nor shall any person be excluded on account of his interest in the event of the action or proceedings, except in the following cases:

1st. When he is a party to the action or proceeding, or the action or proceeding is prosecuted or defended for his immediate benefit;

2d. When his interest is a present, certain, and vested interest.

1. Where a witness is examined on his voir dire, as to his interest, the party offering him, may cross-examine him. *Beach* v. *Covillaud*, 2 Cal. 237.

2. Sections 392 and 393 exclude all testimony, when the witness would be benefited by it. *Jones* v. *Post*, 4 ib. 14; *Griffin* v. *Aesop*, ib. 406.

3. The indorser of a note is not a party; he may be a witness. *Tomlinson* v. *Spencer*, 5 ib. 291.

4. An agent may be a witness as to his authority. Ib.

5. A witness may be examined as to whether he belongs to a secret society, with a view to show that the principles and objects of such society are such that his testimony is liable to suspicion of unfairness. *People* v. *Reyes*, ib. 347; *People* v. *Christie*, 2 Abbott, 256.

6. A party has no right to cross-examine a witness except as to facts and circumstances connected with the matter stated in his direct examination. *Landsberger* v. *Gorham*, 5 Cal. 450.

7. In a suit by a claimant of attached property against the sheriff, the testimony of a subsequent attaching creditor who has executed an indemnifying bond to the sheriff to hold him harmless in holding the property, is not admissible. Ib.; *Howland* v. *Willetts*, 5 Seld. 170.

8. A broker cannot be a witness if his commission depends upon the result. *Shaw* v. *Davis*, 5 Cal. 466.

9. Where the clerk of the court is called as a witness to prove the records of the court of which he is a clerk, it is no objection that he is interested in the result of the suit. *Price* v. *Dunlap*, ib. 483.

10. In an action against a corporation, a witness who was a member of the corporation when the liabilities were incurred, on which the action was brought, is incompetent. *McAuley* v. *York Mining Co.*, 6 ib. 80.

11. In an action against the endorser of a note where demand and notice are not averred, but where it is averred that the maker paid the endorser the value of the note, and that the endorser agreed to pay it, the maker of the note is not a competent witness to prove those facts. His interest is not equally balanced. *Palmer* v. *Tripp*, ib. 82.

12. A defendant, though not served, if a party to the record, cannot be called as a witness under the first subdivision above, if the evidence connects him with the trespass. *Gates* v. *Nash*, ib. 192.

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* Statutes of 1854, 84.

13. The maker of a note, after judgment against him, is a competent witness for the endorser, because his interest is equally balanced. *Vance* v. *Collins*, ib. 435.

14. A witness, responsible to the plaintiff as endorser of the note, had a direct interest in establishing a lien upon the property of the defendants, and was therefore an incompetent witness for that purpose. *Soule* v. *Dawes*, ib. 473.

15. The first subdivision of the section is not controlled by the first part and the succeeding section. *Lucas* v. *Payne*, 7 ib. 92.

16. A co-defendant, although material as a witness, cannot be examined until his case is passed upon, if he is improperly joined as a co-defendant. Ib.; *Domingo* v. *Getman*, 9 ib. 97.

17. A witness is competent if his wages did not depend upon the fact whether gold was taken out of the particular locality in dispute. *Live Yankee Co.* v. *Oregon Co.*, ib. 40.

18. Where the defeat of plaintiff would inevitably result in S. obtaining the fund in controversy: held, that S, although not a party to the suit, was incompetent as a witness. *McEwen* v. *Johnson*, 7 ib. 258.

19. As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself; but where evidence is introduced, showing a collusion between vendor and purchaser to defraud the creditors of the former, the declarations of the vendor are admissible, and, *a fortiori*, his sworn statement. *Howe* v. *Scannell*, 8 ib. 325.

20. The interest must be a legal and not a moral interest. *Jones* v. *Love*, 9 ib. 68.

21. A person who has been a stockholder in an incorporated company, but ceased to be such holder before suit was brought, is a competent witness in an action in the name of such company. *Tuolumne Water Co.* v. *Columbia Water Co.*, 10 ib. 193.

22. The lessor of plaintiff is a competent witness in an action for trespass to the leased premises, where the lease does not bind him to protect the plaintiff against trespassers. *McCormick* v. *Bailey*, ib. 230.

23. In an action of trespass for entering upon the mining ground of plaintiff, and digging the same up, and converting the gold bearing earth, the vendor of the plaintiff is a competent witness, although a part of the purchase money is still due him. *Rowe* v. *Bradley*, 12 ib. 222.

24. A party has a right to a preliminary oath, called the voir dire, administered to a witness against him, and to examine him touching his competency before he is sworn in chief. *Seeley* v. *Engell*, 3 Kern. 542.

393. [1854.*] The true test of the interest of a person, which shall render him incompetent as a witness, shall be that he will gain or lose by the direct legal operation and effect of the judgment, or that the record of the judgment will be legal evidence for or against him, in some other action; but nothing in this, or in the last section, shall prevent a party calling as a witness the adverse party to the action, or

* Statutes of 1854, 84.

a person whose interest is adverse, nor a party being a witness in the cases mentioned in section four hundred and twenty-three.

1. A driver is not a competent witness for his employer, in an action for negligently driving against one, without previously being released by his employer. *Finn* v. *Vallejo Wharf Co.*, 7 Cal. 253.

2. One who has indemnified the sheriff for taking property by virtue of an execution, is not a competent witness for the sheriff in defense to a suit against him. *Howland* v. *Willetts*, 5 Seld. 170.

394. [1854.*] The following persons shall not be witnesses:

1st. Those who are of unsound mind at the time of their production for examination;

2d. Children under ten years of age, who, in the opinion of the court appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly;

3d. Indians, or persons having one-half or more of indian blood, and negroes, or persons having one-half or more of negro blood, in an action or proceeding to which a white person is a party;

4th. Persons against whom judgment has been rendered upon a conviction for a felony, unless pardoned by the governor, or such judgment has been reversed on appeal.

1. 3d. Held to apply to Chinese. *People* v. *Hall*, 4 Cal. 399.

395. A husband shall not be a witness for or against his wife, nor a wife a witness for or against her husband; nor can either, during the marriage, or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage. But this exception shall not apply to an action or proceeding by one against the other.

1. The wife cannot be a witness in an action in which her husband is a party, whether she be a party or not. *Macondray* v. *Wardle*, 7 Abbott, 3.

396. An attorney or counselor shall not, without the consent of his client, be examined as a witness as [to] any communication made by the client to him, or his advice given thereon, in the course of professional employment.

1. *Landsberger* v. *Gorham*, 5 Cal. 450.

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* Statutes of 1854, 84.

397. A clergyman or priest shall not, without the consent of the person making the confession, be examined as a witness as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.

398. A licensed physician or surgeon shall not, without the consent of his patient, be examined as a witness, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

399. A public officer shall not be examined as a witness as to communications made to him in official confidence, when the public interest would suffer by the disclosure.

400. The judge himself, or any juror, may be called as a witness by either party; but in such case it shall be in the discretion of the court or judge to order the trial to be postponed or suspended, and to take place before another judge or jury.

401. When a witness does not understand and speak the English language, an interpreter shall be sworn to interpret for him.

CHAPTER II.

MANNER OF COMPELLING THE ATTENDANCE OF WITNESSES, AND THEIR RIGHTS AND DUTIES.

402. [1855.*] A subpœna may require, not only the attendance of the person to whom it is directed at a particular time and place, to testify as a witness, but may also require him to bring any books, documents, or other things under his control, to be used as evidence. No person shall be required to attend as a witness before any court, judge, justice, or any other officer out of the county in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial.

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* Statutes of 1855, 198.

403. [1859.*] *The subpœna shall be issued as follows:*

1*st. To require attendance before a court, or at the trial of an issue therein, it shall be issued in the name and under the seal of the court before which the attendance is required, or in which the issue is pending;*

2*d. To require attendance out of court before a judge, justice, or other officer authorized to administer oaths, or take testimony in any matter under the laws of this state; it shall be issued by the judge, justice, or any other officer before whom the attendance is required;*

3*d. To require attendance before a commissioner appointed to take testimony by a court of a foreign country, or of the United States, or of any other state in the United States, or of any other district or county within this state; it may be issued by any judge, or justice of the peace, in places within their respective jurisdictions, with like power to enforce attendance, and upon certificate of contumacy to said court, to punish contempt of their process, as such judge or justice could exercise, if the subpœna directed the attendance of the witness before their courts in a matter pending therein.*

404. The service of a subpœna shall be made by showing the original, and delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and one day's attendance there. Such service may be made by any person.

405. If a witness be concealed in a building or vessel, so as to prevent the service of a subpœna upon him, any court or judge, or any officer issuing the subpœna, may, upon proof by affidavit of the concealment and of the materiality of the witness, make an order that the sheriff of the county serve the subpœna; and the sheriff shall serve it accordingly, and for that purpose may break into the building or vessel where the witness is concealed.

406. A person present in court, or before a judicial officer, may be required to testify, in the same manner as if he were in attendance upon a subpœna issued by such court or officer.

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* Statutes of 1859, 218.

407. It shall be the duty of a witness, duly served with a subpœna, to attend at the time appointed, with any papers under his control required by the subpœna, to answer all pertinent and legal questions; and, unless sooner discharged, to remain till the testimony is closed.

1. A witness cannot be cross-examined except in reference to matters concerning which he has been examined in chief. *Thornburgh* v. *Hand*, 7 Cal. 561.

2. Where the vendee replevied the goods from the attaching creditor, and only established title by proving a possession of several months, it was competent for the defendant in replevin, on cross-examination of plaintiff's witness, to ask in whose possession the chattels were at a certain period anterior to the possession proved by plaintiff, in order to draw from him, if possible, the fact that plaintiff's possession was a fraud to hide the debtor's property. Ib.

3. The court may permit a witness to be recalled after the plaintiff has closed the case. It is a matter of discretion, and it is not only right but the duty of the court, if the ends of justice require it. *Fairchild* v. *California Stage Co.*, Cal. July T. 1859.

4. Courts are apt to take too narrow a view of the rights of cross-examination, confining it to the subject matter of the examination in chief. Undoubtedly the cross-examination cannot go beyond that matter, but it ought to be allowed a very free range within it. The witness may be sifted as to every fact, touching the matters as to which he testifies, so that his temper, leanings, relations to the parties and cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his character, his means of knowledge, his general and particular acquaintance with the subject matter, may be fully tested. *Jackson* v. *Feather River and Gibsonville Water Co.*, Cal. July T. 1859.

5. The admission of leading questions, in the examination of a witness, is always in the discretion of the court, subject however to be reviewed, and will not be regarded as error unless the discretion has been abused. *Budlong* v. *Van Nostrand*, 24 Barb. 25.

408. A witness shall answer questions legal and pertinent to the matter in issue, though his answer may establish a claim against himself; but he need not give an answer which shall have a tendency to subject him to punishment for a felony; nor need he give an answer which shall have a direct tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. But a witness shall answer as to the fact of his previous conviction for felony.

1. The opinions of a person, not an expert, are not evidence. *Reynolds* v. *Jourdan*, 6 Cal. 108.

2. Hearsay testimony to a fact admitted by both parties, may be given. *Williams* v. *Chadbourne*, 6 Cal. 559.

3. A party committed for refusing to answer questions propounded to him as a wit-

ness, under an order that he stand committed till he answer the questions, will be discharged on habeas corpus, where it appears that the suit has abated; there being no longer parties or subject matter before the court, there is no longer a case in which the question can be asked. *Ex parte Rowe*, 7 Cal. 175.

4. When the answer of a witness would subject him to criminal punishment, he is not privileged from answering on the ground that his answer would disgrace him, but solely on the ground that he is not compelled to criminate himself. When a question is not pertinent to the issue, the witness is privileged from answering on the ground that his answer would disgrace him. *Ex parte Rowe*, 7 Cal. 184.

5. A witness cannot be cross-examined except in reference to matters concerning which he has been examined in chief. *Thornburgh* v. *Hand*, 7 Cal. 561.

409. Disobedience to a subpœna, or a refusal to be sworn, or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpœna, or requiring the witness to be sworn; and if the witness be a party, his complaint may be dismissed or his answer stricken out.

410. A witness disobeying a subpœna shall also forfeit to the party aggrieved the sum of one hundred dollars, and all damages which he may sustain by the failure of the witness to attend; which forfeiture and damages may be recovered in a civil action.

411. In case of failure of a witness to attend, the court or officer issuing the subpœna, upon proof of the service thereof, and of the failure of the witness, may issue a warrant to the sheriff of the county to arrest the witness and bring him before the court or officer where his attendance was required.

412. If the witness be a prisoner, confined in a jail or prison within this state for any other cause than a sentence for felony, an order for his examination in the prison upon deposition, or for his temporary removal and production before a court or officer for the purpose of being orally examined, may be made as follows:

1st. By the court itself, in which the action or special proceeding is pending;

2d. By a judge of the supreme court, district court, or county judge of the county where the action or proceeding is pending, if before a judge or other person out of court.

413. Such order can only be made upon affidavit, showing the nature of the action or proceeding, the testimony expected from the witness, and its materiality.

414. If the witness be imprisoned in the county where the action or proceeding is pending, and for a cause other than a sentence for felony, his production may be required. In all other cases, his examination, when allowed, shall be taken upon deposition.

415. Every person who has been in good faith, served with a subpœna to attend as a witness before a court, judge, commissioner, referee, or other person, in a case where the disobedience of the witness may be punished as a contempt, shall be exonerated from arrest, in a civil action, while going to the place of attendance, necessarily remaining there, and returning therefrom.

1. This section does not exempt him from obeying any ordinary process of the court, *e. g.*, to attend and answer concerning his property, under a supplementary writ. *Page* v. *Randall*, 6 Cal. 32.

416. The arrest of a witness contrary to the last section, shall be void; but an officer shall not be liable to the party for making the arrest in ignorance of the facts creating the exoneration, but shall be liable for any subsequent detention of the party, if such party claim the exemption and make an affidavit, stating:

1st. That he has been served with a subpœna to attend as a witness before a court, officer, or other person; specifying the same, the place of attendance, and the action or proceeding in which the subpœna was issued; and,

2d. That he has not been thus served by his own procurement, with the intention of avoiding an arrest;

3d. That he is at the time going to the place of attendance, or returning therefrom, or remaining there in obedience to the subpœna. The affidavit may be taken by the officer, and shall exonerate him from liability for discharging the witness when arrested.

CHAPTER III.

OF THE EXAMINATION OF PARTIES TO AN ACTION OR PROCEEDING, AND OF PERSONS FOR WHOSE IMMEDIATE BENEFIT SUCH ACTION OR PROCEEDING IS PROSECUTED OR DEFENDED.

417. No action to obtain a discovery under oath, in aid of the prosecution or defense of another action or proceeding shall be allowed, nor shall any examination of a party be had on behalf of the adverse party, except in the manner prescribed by this chapter.

1. This section does not apply to prevent an examination of a debtor in a proceeding supplementary to an execution. *Dunham* v. *Nicholson*, 2 Sand. 636; *Quick* v. *Keeler*, ib. 231.

418. A party to an action or proceeding may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties; and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify at the trial, and he may be examined on a commission.

1. A co-defendant is not a competent witness, where his testimony would enure to his own benefit. He could show his co-defendant was not his partner. *Hotaling* v. *Cronise*, 2 Cal. 60; *Beach* v. *Covillaud*, ib. 237; *Sparks* v. *Kohler*, 3 ib. 299; *Johnson* v. *Henderson*, ib. 368; *Buckley* v. *Manifé*, ib. 441; *Lucas* v. *Payne*, 7 ib. 92.

2. When not served with process in an action of trespass, he is still incompetent. *Gates* v. *Nash*, 6 ib. 192.

3. The declarations and conduct of the seller and buyer are competent testimony to show fraudulent intent. *Landecker* v. *Houghtaling*, 7 ib. 391; *Visher* v. *Webster*, 8 ib. 109; *Cohn* v. *Mulford*, Cal. Oct. T. 1859.

4. By making an adverse party a witness, his incompetency to be heard for himself or for his co-defendant, or co-plaintiff, is waived. *Turner* v. *McIlhaney*, ib. 575.

5. A party to a suit who is made a witness by statute, is to become such under the same requisition and restrictions as any other witness. *Arnold* v. *Arnold*, 13 Verm, 370.

6. In an action for a tort against two or more defendants, each defendant is a competent witness for his co-defendant. As to what matters upon which he may give evidence, discussed. *Beal* v. *Finch*, 1 Kern. 128.

7. The examination of a defendant not served with process, as a witness, will not authorize the examination of a plaintiff as a witness on behalf of himself and his co-plaintiffs. *Robinson* v. *Frost*, 14 Barb. 536.

8. Where the plaintiff is called by defendant, his testimony in a former suit, directly

contrary to his present evidence, may be given as an admission, on the trial. *Pickard* v. *Collins*, 23 ib. 444.

9. Under the code, a defendant cannot be examined by a co-defendant to establish usury as a defense to their joint promissory note. *Ely* v. *Miller*, 1 Abbott, 241.

10. This does not authorize the examination of a party except as a witness at the trial of an issue in the action, or upon commission, his testimony to be read on the trial. On a motion, *e. g.*, to vacate an order of arrest, this order to examine should not be granted. *Huelin* v. *Ridner*, 6 ib. 19.

419. The examination of a party thus taken, may be rebutted by adverse testimony.

420. If a party refuse to attend and testify at the trial, or to give his deposition before trial, or upon a commission when required, his complaint, answer or reply, may be stricken out, and judgment be taken against him; and he may be also, in the discretion of the court, proceeded against as in other cases for a contempt.

421. A party examined by an adverse party, as in this chapter provided, may be examined on his own behalf in respect to any matter pertinent to the issue. But if he testify to any new matter not responsive to the inquiries put to him by the adverse party, or necessary to explain or qualify his answer thereto; or discharge, when his answer would charge himself, such adverse party may offer himself as a witness on his own behalf, in respect to such new matter, and shall be so received.

1. The party so offering to be a witness for himself, must only explain the new matter, and no more. *Dwinelle* v. *Henriquez*, 1 Cal. 387.

2. When a party testified that he executed a promissory note described, he charges himself and may show that he has since paid the note. *Jones* v. *Love*, 9 ib. 68.

3. If a party call an adverse party as a witness after the examination in chief, the adverse party may give his testimony generally upon the issues. *Drake* v. *Eakin*, 10 ib. 312; *Tuolumne Water Co.* v. *Columbia & Stanislaus Water Co.*, 10 ib. 395.

4. Where a party called, testifies to independent matter in his own behalf, the court is not bound to believe him and decide according to his testimony. *Roberts* v. *Gee*, 15 Barb. 449.

5. Where a plaintiff calls the defendant as a witness to prove the plaintiff's claim, and the defendant on a cross-examination in his own behalf proves a counter claim as set up in his answer, the plaintiff may be examined in reference to the evidence given by the defendant, on the subject of the counter claim. *Harpell* v. *Irwin*, 1 Abbott, 144.

6. The defendant was examined by the plaintiff on the trial; after which, being examined upon his own behalf, he testified to a counter claim that existed previous to

the indebtedness upon which the action was brought, and the plaintiff was properly admitted to testify as to the new matter. *Anonymous*, 3 Abbott, 102.

422. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination as if he were named as a party.

423. [1854.*] Parties may be witnesses on their own behalf when the action is brought for the settlement of, or in relation to, the business and accounts of a copartnership then existing or which had previously existed between them, to prove vouchers or items of account under one hundred dollars.

CHAPTER IV.

ON AFFIDAVITS.

424. An affidavit to be used before any court, judge, or officer of this state, may be taken before any judge, or clerk of any court, or any justice of the peace, or notary public in this state.

1. Affidavits of the loss of an instrument, &c., to be used in court, may taken ex parte, without notice. *McCann* v. *Beach*, 2 Cal. 25.

2. By our statute, a county recorder has authority to take affidavits to be used in any court of justice in this state, and may certify to a verified complaint. *Pfeiffer* v. *Rhein*, Cal. July T. 1859.

425. An affidavit taken in another state of the United States, to be used in this state, shall be taken before a commissioner appointed by the governor of this state, to take affidavits and depositions in such other state, or before any judge of a court of record having a seal.

426. An affidavit taken in a foreign country to be used in this state, shall be taken before an embassador, minister, or consul of the United States, or before any judge of a court of record having a seal, in such foreign country.

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* Statutes of 1854, 84.

427. When an affidavit is taken before a judge of a court in another state, or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof, shall be certified by the clerk of the court, under the seal thereof.

CHAPTER V.

OF DEPOSITIONS TAKEN IN THIS STATE.

428. The testimony of a witness in this state, may be taken by deposition in an action, at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases:

1st. When the witness is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended;

2d. When the witness resides out of the county in which his testimony is to be used;

3d. When the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required;

4th. When the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend.

1. Taking testimony by depositions is in derogation of the common law, and must not only be done before the proper officer, but every requirement of the law must be complied with. *McCann* v. *Beach*, 2 Cal. 25; *Dye* v. *Bailey*, ib. 383; *Dwinelle* v. *Howland*, 1 Abbott, 87.

2. To make the testimony of a witness admissible, he must be competent at the time of taking his deposition. It is the effect of the interest on the witness, at the time his testimony is taken, that disqualifies him. *Kimball* v. *Gearheart*, 12 Cal. 27.

3. A motion at the trial to suppress the whole of a deposition, on the ground that some of the interrogatories and parts of the deposition are improper, should be denied. If any part of the deposition is competent, the objection should be confined to that which is not so. *Commercial Bank of Pennsylvania* v. *Union Bank of New York*, 1 Kern. 203.

4. 3d. On the trial it must be shown that the witness has continued absent so that his attendance could not be compelled by process of law. *Fry* v. *Bennett*, 4 Duer, 247.

429. [1859.*] *Either party may have the deposition taken of a witness in this state, before any judge or clerk, or any justice of the peace, or notary public in this state, on serving on the adverse party previous notice of the time and place of examination, together with a copy of an affidavit, showing that the case is one mentioned in the last section. At any time during the forty days, immediately after the service of the summons by publication has been completed, and at any time thereafter, when the defendant has not appeared, the notice required by this section may be served on the clerk of the court where the action is pending. Such notice shall be at least five days, and in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order shall be served with the notice.*

1. An order to take testimony by deposition should specify the notice to be given to the adverse party, otherwise it ought not to be read in evidence. *Ellis* v. *Jaszynsky*, 5 Cal. 444.

2. It is no ground for the exclusion of a deposition that it was noticed to be taken before the county judge, but was taken before the county clerk. *Williams* v. *Chadbourne*, 6 ib. 559.

3. Notice of time and place having been given, it is a matter of no importance who took the deposition. Ib.

4. A party appearing at the time and place, and cross-examining the witness, waives whatever objection may be had because the notice is too short. *Jones* v. *Love*, 9 Cal. 68.

430. Either party may attend such examination, and put such questions, direct and cross, as may be proper. The deposition, when completed, shall be carefully read to the witness, and corrected by him in any particular, if desired; it shall then be subscribed by the witness, certified by the judge or officer taking the deposition, inclosed in an envelope or wrapper, sealed, and directed to the clerk of the court in which the action is pending, or to such person as the parties in writing may agree upon, and either delivered by the judge or officer to the clerk or such person, or transmitted through the mail, or by some safe private opportunity; and thereupon such deposition may be

* Statutes of 1859, 28.

used by either party upon the trial, or other proceeding, against any party giving or receiving the notice, subject to all legal exceptions. But if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the time of the examination. If the deposition be taken by the reason of the absence or intended absence from the county, of the witness, or because he is too infirm to attend, proof by affidavit or oral testimony shall be made at the trial, that the witness continues absent or infirm, to the best of the deponent's knowledge or belief. The deposition thus taken may also be read in case of the death of the witness.

1. Where a deposition is taken ex parte, though after notice, and the witness is therefore not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it. *Spring* v. *Hill*, 6 Cal. 17.

2. The certificate must state that the deposition was read to the witness before signing; it must comply with the statute. *Williams* v. *Chadbourne*, ib. 559.

3. Objections to the competency of a witness must be taken at the time of his examination, and not reserved till the trial, or they will be deemed waived. *Jones* v. *Love*, 9 Cal. 68.

431. When a deposition has been once taken, it may be read in any stage of the same action or proceeding by either party, and shall then be deemed the evidence of the party reading it.

1. The object of this section is, to enable either party to read a deposition admissible in itself, once taken, in any stage of the action or proceeding—not to render it admissible simply because it was taken. *Turner* v. *McIlhaney*, 8 Cal. 576.

CHAPTER VI.

OF DEPOSITIONS TAKEN OUT OF THIS STATE.

432. The testimony of a witness out of the state may be taken by deposition in an action, at any time after the service of the summons, or the appearance of the defendant; and in a special proceeding, at any time after a question of fact has arisen therein.

1. Diligence must be exercised in applying for a commission. *Pierson* v. *Holbrook*, 2 Cal. 598.

2. The proper time to object to such deposition is when it is offered in evidence. *Mills* v. *Dunlap*, 3 Cal. 94.

3. It is also admissible, notwithstanding the witness may have returned to the state since his examination, if he is not within the state at the time of the trial. *Markoe* v. *Aldrich*, 1 Abbott, 55.

4. On the execution of a commission, the parties have a right to appear by counsel. Cross interrogatories cannot be withdrawn unless by mutual consent. A witness cannot shield himself from answering a cross interrogatory, by a reference to his previous answer to a direct one. *Union Bank* v. *Torrey*, 2 Abbott, 269; 5 Duer, 626.

5. This provision is an innovation upon the common law, and must be strictly exercised. *Creamer* v. *Jackson*, 4 Abbott, 413.

433. The deposition of a witness out of this state shall be taken upon commission issued from the court, under the seal of the court, upon an order of the judge, or court, or county judge, on the application of either party, upon five days' previous notice to the other. It shall be issued to a person agreed upon between the parties, or if they do not agree, to any judge or justice of the peace selected by the officer granting the commission, or to a commissioner appointed by the governor of this state, to take affidavits and depositions in other states. (*a*)

434. Such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties disagree as to their form, by the judge or officer granting the order for the commission, at a day fixed in the order, may be annexed to the commission; or, when the parties agree to that mode, the examination may be without written interrogatories.

435. The commission shall authorize the commissioner to adminis-

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(*a*) STATUTES OF 1858, 22.

1. The first section of an act entitled "An act empowering the governor to appoint commissioners of deeds, and defining the duties of such officers," passed March 20th, 1850, is hereby amended so as to read as follows: The governor may, when in his judgment it may be necessary, appoint in each of the United States, and in each of the territories and districts of the United States, and in each foreign state, territory, and colony, one or more commissioners, to continue in office four years, unless removed by the governor. Every such commissioner shall have power to administer oaths, *and to take depositions and affidavits*, to be used in this state; and also to take the acknowledgment or proof of any deed or other instrument to be recorded in this state.

ter an oath to the witness, and to take his deposition in answer to the interrogatories; or, when the examination is to be without interrogatories, in respect to the question in dispute; and to certify the deposition to the court, in a sealed envelope directed to the clerk, or other person designated or agreed upon, and forwarded to him by mail, or other usual channel of conveyance.

1. An appeal does not lie from an order refusing to grant a commission to take testimony. *People* v. *Stillman*, 7 Cal. 117.

2. The commission is defective if there is not a seal attached. *Whitney* v. *Wyncoop*, 4 Abbott, 370.

436. A trial or other proceeding, shall not be postponed by reason of a commission not returned, except upon evidence satisfactory to the court, that the testimony of the witness is necessary, and that proper diligence has been used to obtain it.

CHAPTER VII.

OF PROCEEDINGS TO PERPETUATE TESTIMONY.

437. [1859.*] *The testimony of a witness or witnesses may be taken and perpetuated as provided in this chapter.*

438. [1859.*] *The applicant shall present to a district or county judge, a petition verified by the oath of the applicant, stating:*

1*st. That the applicant expects to be a party to an action in a court in this state, and in such case, the name or names of the person or persons whom he expects will be adverse parties; or,*

2*d. That the proof of some fact or facts is necessary to perfect the title to property in which he is interested, or to establish marriage descent, heirship or any other matter which may hereafter become material to establish, though no suit may at the time be anticipated, or if anticipated, he may not know the parties to such suit; and,*

3*d. The name or names of the witness or witnesses to be examined at his or their place of residence, and a general outline of the facts*

* Statutes of 1859, 218.

expected to be proved. The judge to whom such petition is presented shall make an order allowing the examination and prescribing the notice to be given, which notice, if the parties are known and reside in this state, shall be personally served on them; and if unknown, such notice shall be served on the clerk of the county where the property to be affected by such evidence is situated, and a notice thereof published in some newspaper to be designated by the judge making the order.

439. [1859.*] *Upon proof of service of the notice as provided in the last section, it shall be the duty of the judge before whom the depositions are ordered to be taken, to proceed to take the depositions of the witnesses named in said petition, upon the facts therein set forth; and the taking of the same may be continued from time to time in the discretion of the judge.*

1. It must be made to appear to the judge that the object is in good faith, to perpetuate testimony. *Paton* v. *Westervelt*, 5 How. Pr. 399.

440. [1859.*] *The examination shall be by question and answer, unless the parties otherwise agree. The deposition, when taken, shall be carefully read to, and subscribed by, the witness, then certified by the judge, and immediately thereafter filed in the office of the clerk of the district court of the county where the same was taken, together with the order for the examination, the petition on which the same was granted, and the proof of service of notice.*

441. [1859.*] *The affidavits or other proof filed with the depositions, or certified copies thereof, shall be prima facie evidence of the facts therein stated.*

442. [1859.*] *If the trial be had between the persons named in the petition as parties expectant, or their successors in interest, or between any parties wherein it may be material to establish the facts which such depositions prove or tend to prove, upon proof of the death or insanity of the witness or witnesses, or of his or their inability to attend the trial by reason of age, sickness, or settled infirmity, the deposition or depositions, or certified copies thereof, may be used by either party, subject to all legal objections. But if the parties attend at the examina-*

* Statutes of 1859, 218.

tion, no objection to the form of an interrogatory shall be made at the trial, unless the same was stated at the examination.

CHAPTER VIII.

ADMINISTRATION OF OATHS AND AFFIRMATIONS.

443. Every court of this state, every judge or clerk of any court, every justice of the peace, and every notary public, and every officer authorized to take testimony, or to decide upon evidence in any proceeding, shall have power to administer oaths or affirmations. (*a*)

444. When a person is sworn who believes in any other than the christian religion, he may be sworn according to the peculiar ceremonies of his religion, if there be any such.

445. Any witness who desires it may, at his option, instead of taking an oath, make his solemn affirmation or declaration, by assenting, when addressed in the following form: "You do solemnly affirm that the evidence you shall give in this issue, (or matter) pending between ——— and ———, shall be the truth, the whole truth, and nothing but the truth." Assent to this affirmation shall be made by the answer, "I do." A false affirmation or declaration shall be deemed perjury, equally with a false oath.

(*a*) STATUTES OF 1852, 106.

An act concerning the administration of oaths. Passed May 1, 1852.

1. That all officers of this state, authorized by law to administer oaths or affirmations, may certify the same under their hands, without fixing to such certificate their seals of office.

2. That all oaths or affirmations heretofore administered by any officer of this state and by him certified under his hand, without his seal of office, shall be as effectual for all purposes as if such seal had been affixed to such certificate.

CHAPTER IX.

INSPECTION OF DOCUMENTS, AND MISCELLANEOUS PROVISIONS AS TO RECORDS AND WRITINGS.

446. Any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document, or paper, in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the book, document, or paper, from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing for a contempt. This section shall not be construed to prevent a party from compelling another to produce books, papers, or documents, when he is examined as a witness.

1. The court is authorized to make an order directing a party to produce books and papers in court. *Barnstead* v. *Empire Mining Co.*, 5 Cal. 299.

2. A subscribing witness to a written instrument, if within the jurisdiction of the court, must be produced, or some sufficient reason given for his absence. *Stevens* v. *Irwin*, 12 ib. 306.

3. A subscribing witness, who is called to prove the execution of the instrument, who testifies that it was signed in his presence, "to the best of his recollection," is sufficient to allow it to be read in evidence. *McGarrity* v. *Byington*, ib. 426.

4. The court has the power, in any case where either party has in his possession or power, papers, books, or documents containing evidence bearing upon the merits of the action, to compel such party to exhibit the same to the adverse party, if deemed proper. *Powers* v. *Elmendorf*, 4 How Pr. 60.

5. An order for discovery may be enforced before issue joined in the cause. *Miller* v. *Mather*, 5 ib. 160.

6. An application for discovery or inspection must be made upon petition. *Dole* v. *Fellows*, ib. 451.

7. Where the president, or other officer of a corporation, has no such property in, or control over, the books of the corporation, as gives him the right, or makes it his duty to produce them under a *duces tecum*, the proper remedy of the opposite party is to obtain sworn copies, or an inspection and review. *La Farge* v. *La Farge Ins. Co.*, 14 ib. 26.

8. Where, upon a motion to vacate an order for discovery, made under this section,

the party denies positively, under oath, the possession of the books, etc., ordered to be produced, the order must be vacated. *Ahoyke* v. *Wolcott*, 4 Abbott, 41; *Bradstreet* v. *Bailey*, ib. 233.

9. The history of the rule allowing a party's books of account as evidence in his own behalf. *Conklin* v. *Stanler*, 8 ib. 396.

447. There shall be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

1st. When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made;

2d. When the original is in possession of the party against whom the evidence is offered, and he fails to produce it, after reasonable notice;

3d. When the original is the record, or other document, in the custody of a public officer;

4th. When the original has been recorded, and a certified copy of the records is made evidence by statute;

5th. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

1. The best evidence the nature of the case is susceptible of must be adduced. *McCann* v. *Beach*, 2 Cal. 25; *Macy* v. *Goodwin*, 6 ib. 579.

2. Proof of the loss of an instrument may be made by a party's own affidavit, to lay the foundation for proving its contents. But the affidavit of a third person, that a trunk of the party, containing his papers, is lost, is insufficient, without showing that it contained the papers in question. But this the party may show by his own oath. Ib.

3. In the case of lost instruments, where no copy has been preserved, it is not to be expected that witnesses can recite their contents, word for word. *Posten* v. *Rassette*, 5 ib. 467.

4. Mere evidence of search is not sufficient, for the search may not have been diligent. *Folsom's Ex'rs* v. *Scott*, 6 ib. 460.

5. Proof of loss of receipts, without proof of their genuineness, is not a sufficient predicate for the admission of evidence as to their contents. *Reynolds* v. *Jourdan*, ib. 108.

6. One of the plaintiffs can be introduced as a witness to prove the loss and destruction of certain mining rules and regulations, as a predicate to the introduction of secondary evidence, to prove their contents. *Grass Valley Quartz Co.* v. *Stackhouse*, ib. 413.

7. Where an original instrument, proved to be lost, has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for. *Brotherton* v. *Hart*, ib. 488.

8. The judgment book, containing the record of the judgment in the former suit, was destroyed. It would be improper, even admitting it could be done, to have admitted parol evidence of the pleadings and issues between the parties, unless the appellant had also been prepared to introduce a certified copy of the judgment. *Nims* v. *Johnson*, 7 Cal. 110.

9. Parol evidence is not admissible to vary the terms of a written contract, so as to make it embrace property not described therein. *Osborn* v. *Hendrickson*, ib. 282.

10. Parol evidence is inadmissible to show that a bill of sale included property not described therein. Where a bill of sale is defective in such particular, it can only be altered by a direct proceeding in chancery for the purpose of reforming it. Ib. 31.

11. Secondary evidence of the contents of a deed or grant is admissible, where the possession of the original is traced to the possession of a party not in the state. *Gordon* v. *Searing*, ib. 49.

12. When a party, in consideration of a conveyance of land to him, agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, at the same time acknowledging his liability: held, that the liability thus assumed is not the conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for which he had received a full consideration. In such case, parol evidence of the deed is admissible to prove consideration for the agreement to pay the note. *Palmer* v. *Tripp's Admr.*, ib. 95.

13. The cause or motive for the destruction of the instrument, when voluntarily made, must determine the admissibility of secondary evidence. *Bagley* v. *McMickle*, 9 ib. 430.

14. In an action on a judgment, where the record book containing such judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment and its contents. *Ames* v. *Hoy*, 12 ib. 10.

15. A court of equity will relieve against mistake as well as fraud, in a deed or contract in writing, and parol evidence is admissible to show the mistake; and if apparent on the instrument itself, the court will correct the mistake without evidence *aliunde*. *Wagenblast* v. *Washburn*, ib. 208.

16. The defendant, in a suit pending, may be made to discover books, papers and documents in his possession or power, relating to the merits thereof, and which are necessary to the plaintiff, to enable him to prepare for the trial. *Gould* v. *McCarty*, 1 Kern. 575.

17. Parol evidence is admissible to explain the meaning of characters, marks and technical terms used in a particular business. *Dana* v. *Fiedler*, 2 ib. 40.

18. Where two letters were written simultaneously, signed by the same individual, containing the same words, and addressed to the same person, one being sent to the person addressed, and the other retained by the writer, each is an original, and the one retained may be given in evidence, without proving any notice to produce the other. *Hubbard* v. *Russell*, 24 Barb. 404.

448. The party producing a writing as genuine, which has been altered, or appears to have been altered, after its execution, in a part

material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.

1. A card published in a newspaper, without the knowledge of either party to the suit, is no evidence but to impeach the credibility of a witness. *Dwinelle* v. *Henriquez*, 1 Cal. 387.

2. It is error to admit letters in evidence, without proving that they were written by the party intended to be charged by their contents. *Sinclair* v. *Woods*, 3 ib. 98.

3. To prove handwriting of a subscribing witness, he must be shown to be beyond the jurisdiction of the court, or that diligent search for him had been made without avail. *Powell's Heirs* v. *Hendricks*, ib. 427.

449. A judicial record of this state, or of the United States, may be proven by the production of the original, or a copy thereof, certified by the clerk, or other person having the legal custody thereof, under the seal of the court, to be a true copy of such record. (*a*)

See section 655.

(*a*) STATUTES OF 1857, 103.

An act concerning Evidence. Passed March 26, 1857.

1. Whenever the public records, books or papers in the "custody" of any collector of customs of the United States, or of the register or receiver of any land office of the United States within this state, or in the office of the surveyor general of the United States for the state of California, or in the office and in the custody of the clerk of the circuit, or any district court of the United States for the state of California, shall be required as evidence in any court of this state, copies of such records, books or papers, duly certified by the proper officer under his hand and official seal, where he has a seal, shall be received in evidence with the same force and effect as the originals.

STATUTES OF 1857, 317.

An act concerning certified copies of certain instruments in writing. Passed April 29th, 1857.

1. Copies of all papers lately belonging to the United States board of commissioners for the settlement of private land claims in California, and on file in the office of the surveyor general of the United States for the state of California, and all copies of documents and papers belonging to said surveyor's office, which copies shall have been duly certified to be true copies by said surveyor, shall be received and read in evidence in the same manner and with like effect as the originals.

450. [1854.*] The records and judicial proceedings of the courts of any other state of the United States, may be proved or admitted in the courts of this state, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form.

1. A certificate of exemplification of a judgment rendered in another state, when attested by the clerk, under the seal of the court, and where the presiding judge of the

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* Statutes of 1854, 84.

1. The provisions of this section sustained. *Natoma Water Co.* v. *Clarkin*, Cal. October T. 1859.

2. Duly certified copies of deeds regularly recorded, upon the acknowledgment or proof of execution by the party or parties thereto, subject however, to all the legal exceptions that might be taken to the original if produced, shall be received in evidence in all the courts of this state, without any further or other proof of the execution thereof, in the same manner and with like effect as if the originals were produced and proven; provided, it be shown that the said originals are not under the control of the party offering the said copies, or are lost.

1. The provisions of this section sustained. *Skinker* v. *Flohr*, Cal. July T. 1859.

3. Any person wishing, in order to obtain the benefit of this act, to establish the genuineness of any patent for land issued by the United States, or by this state, may apply for that purpose to the district court of the judicial district in which the patented lands, or any part thereof, are situated, after giving public notice of the time of his making said application, at least five days previous to the hearing thereof, either by one insertion in a newspaper, where there is one published in the county wherein the lands or parcels of land in said district may be situated, or in default thereof, by posting said notice on the court house door of said county; provided, that notice shall not be required to be given in more than one county; upon proof being made that the said notice was duly given, the district court shall proceed to inspect the patent, and upon being satisfied that it is genuine, may endorse thereupon or annex thereto, an order under the seal of the court, declaring said patent to be genuine; and if the court be not satisfied that the said patent is genuine, then no other [order] shall be entered or made relative thereto.

4. It shall be the duty of the county recorder of each county in this state to provide a separate book to be called "The Record of Patents," wherein shall be recorded all patents of land or parcels of land situate in their county, whether issued by the United States or the state of California, which may be offered for record, authenticated as in the foregoing section mentioned; and a duly certified copy of any patent recorded as aforesaid, may by offered in evidence in any proceeding or action in this state, with the same effect and force as the original duly exhibited and proven.

court certifies that the attestation is in due form of law, is sufficient, under the act of Congress of May 26th, 1790, to sustain an action upon the judgment in another state. *Thompson* v. *Manrow*, 1 Cal. 428; *Low* v. *Burrows*, 12 Cal. 181.

2. The legislature cannot require a greater amount of proof than that prescribed by Congress, but may require less. *Parke* v. *Williams*, 7 Cal. 247.

3. A judicial decree of a court of a sister state, may be impeached collaterally for fraud, in an action not between the same parties. *Mussina* v. *Belden*, 6 Abbott, 165.

451. A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the clerk, with the seal of the court annexed, if there be a clerk and seal; or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy of such record: together with a certificate of a judge of the court, that the person making the certificate is the clerk of the court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and also, together with the certificate of the minister or embassador of the United States, or of a consul of the United States, in such foreign country, that there is such a court, specifying generally the nature of its jurisdiction, and verifying the signature of the judge and clerk, or other legal keeper of the record.

452. A copy of the judicial record of a foreign country shall also be admissible in evidence upon proof:

1st. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it;

2d. That such original was in the custody of the clerk of the court, or other legal keeper of the same; and

3d. That the copy is duly attested by a seal, which is proved to be the seal of the court where the record remains, if it be the record of a court; or if there be no such seal, or if it be not the record of a court, by the signature of the legal keeper of the original.

See section 655.

453. Printed copies, in volumes, of statutes, code, or other written law, enacted by any other state, territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law, in the courts and judicial tribunals of such state, territory or government,

shall be admitted by the courts and officers of this state, on all occasions, as presumptive evidence of such laws.

See section 655.

454. A seal of a court or public office, when required to any writ or process, or proceeding, or to authenticate a copy of any record or document, may be impressed with wax, wafer, or any other substance, and then attached to the writ, process or proceeding, or to the copy of the record or document, or it may be impressed on the paper alone.

1. The impression of the seal may be made upon paper only. *Connolly* v. *Goodwin*, 5 Cal. 220; *Ross* v. *Bedell*, 5 Duer, 462.

TITLE XII.

OF THE WRIT OF CERTIORARI AND OF MANDAMUS.

CHAPTER I.

THE WRIT OF CERTIORARI, OR REVIEW.

455. The writ of certiorari may be denominated the writ of review.

456. This writ may be granted on application, by any court of this state, except a justice's, recorder's, or mayor's court: the writ shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court, any plain, speedy and adequate remedy.

See section 653.

1. A review and not a mandate should issue to a district court to send up documents where no appeal would lie. *Field* v. *Turner*, 1 Cal. 152.

2. When the writ will lie. *Ex parte Hanson*, 2 Cal. 262.

3. A review to the board of supervisors on the ground of want of jurisdiction, is premature, if taken before the action of the board. *Wilson* v. *Supervisors of Sacramento county*, 3 Cal. 386.

4. A party against whom a judgment is sought to be enforced, although not a party to the mandate, may apply for a writ of review. *Clary* v. *Hoagland*, 5 Cal. 476.

5. When the county court may issue a writ of review. Ib.

6. To the exercise of this power it is not necessary that the court issuing the writ should possess appellate jurisdiction; a district court may issue the writ to a county judge. *Chard* v. *Harrison*, 7 Cal. 113.

7. This writ is not the proper remedy where there has been no excess of jurisdiction. *Coulter* v. *Stark*, ib. 224.

8. A district court can issue a writ to compel a board of supervisors, though only a quasi judicial body, to certify their proceedings to such court for review. *People* v. *Supervisors of El Dorado county*, 8 Cal. 58; overruling *People* v. *Hester*, 6 ib. 679.

9. A district judge has power to issue writs of review and to hear them on their return, at chambers. *People* v. *Supervisors of Marin county*, 10 ib. 244.

10. A certiorari will lie to a board of firemen, who have control of the department, to review their action upon matters in the department. *People* v. *Board of Delegates of the San Francisco Fire Department*, Cal. Jan. T. 1860.

11. It is well settled that a common law certiorari tries nothing but the jurisdiction, and incidentally, the regularity of the proceedings upon which the jurisdiction depends. Ib.

12. The writ of review should not be allowed at the instance of an individual, to review proceedings for the levying a tax or assessment which affects a considerable number of persons. *Wilson* v. *Mayor of New York*, 1 Abbott, 4; *Ex parte Fifty-first Street*, 3 ib. 232.

13. A writ of review stays the proceedings of the officer or court to which it is addressed. *Ex parte Conover*, 5 ib. 182; 24 Barb. 636; 14 How. Pr. 348.

14. The writ is generally allowed as a matter of course, unless it is apparent great injustice will be done by granting it. *People* v. *Peabody*, 5 Abbott, 194.

15. When it appears the writ was granted before the proceedings reviewed by it were terminated, it is the duty of the court to direct a supersedeas of the writ to be entered. Ib.

457. The application shall be made on affidavit by the party beneficially interested, and the court may require a notice of the application to be given to the adverse party, or may grant an order to show cause why it should not be allowed, or may grant the writ without notice.

458. The writ may be directed to the inferior tribunal, board or officer, or to any other person having the custody of the record or proceedings to be certified. When directed to a tribunal, the clerk, if there be one, shall return the writ with the transcript required.

459. The writ of review shall command the party to whom it is

directed to certify fully to the court issuing the writ, at a specified time and place, and annex to the writ a transcript of the record and proceedings, (describing or referring to them, with convenient certainty) that the same may be reviewed by the court: and requiring the party in the mean time to desist from further proceedings in the matter to be reviewed.

460. If a stay of proceedings be not intended, the words requiring the stay shall be omitted from the writ; these words may be inserted or omitted in the sound discretion of the court; but if omitted, the power of the inferior court or officer shall not be suspended, nor the proceedings stayed.

461. The writ shall be served in the same manner as a summons in civil action, except when otherwise expressly directed by the court.

462. The review upon this writ shall not be extended further than to determine whether the inferior tribunal, board or officer has regularly pursued the authority of such tribunal, board or officer.

463. If the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court shall proceed to hear the parties, or such of them as may attend for that purpose, and may thereupon give judgment, either affirming, or annulling, or modifying the proceedings below.

See section 25, of the judiciary act, post.

464. A copy of the judgment, signed by the clerk, shall be transmitted to the inferior tribunal, board, or officer having the custody of the record or proceeding certified up.

465. A copy of the judgment, signed by the clerk, entered upon, or attached to, the writ and return, shall constitute the judgment roll. If the proceeding be had in any other than the supreme court, an appeal may be taken from the judgment in the same manner, and upon the same terms, as from a judgment in a civil action.

1. For costs on writ of review, see section 508.

CHAPTER II.

THE WRIT OF MANDATE, OR MANDAMUS.

466. The writ of mandamus may be denominated the writ of mandate.

467. It may be issued by any court in the state, except a justice's, recorder's or mayor's court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.

See section 653.

1. The supreme court may exercise its jurisdiction by mandate. *People* v. *Turner*, 1 Cal. 143.

2. Mandate is proper to compel a district court to restore an attorney to the roll. Ib.

3. Judgment may be affirmed as to mandate, and reversed as to costs. *McDougal* v. *Roman*, 2 Cal. 80.

4. A mandate lies to compel a judge of a district court to enter judgment on a referee's report. *Russell* v. *Elliott*, ib. 245.

5. A mandate will not lie to compel an inferior court to issue process. *Peralta* v. *Adams*, ib. 594; *Adams* v. *Town*, 3 ib. 247.

6. A mandate will not lie against a sheriff, to compel him to make a deed to land to a purchaser at execution sale, who refuses to pay the purchase money, for the reason that he is the oldest judgment and execution creditor, and entitled to the money; especially when there is an unsettled contest as to the question of lien. *People* v. *Hays*, 4 ib. 127; *Williams* v. *Smith*, 6 ib. 91.

7. A mandate will not issue to compel the performance of an act where the party is invested with discretionary power, but will issue when directory. *People* v. *Bell*, 4 ib. 177.

8. A mandate to a board of supervisors, directing them to issue a warrant for a specified sum, is irregular; it should direct them to audit the account and issue warrants accordingly. *Tuolumne county* v. *Stanislaus county*, 6 ib. 440.

9. A mandate will lie to compel a district court to issue a writ for contempt against parties violating an injunction, pending an appeal. *Merced Mining Co.* v. *Fremont*, 7 Cal. 130.

10. A mandate will lie to compel the board of supervisors to issue a ferry license, when the right should be granted. *Thomas* v. *Armstrong*, ib. 286.

11. The remedy of plaintiff, if there was error in the order modifying the injunc-

tion, is by appeal, but he cannot have a mandamus to compel the issuance of attachment for contempt. *Fremont* v. *Merced Mining Co.*, 9 Cal. 18.

12. A mandate will not lie to compel an attorney general to bring an action in the nature of a quo warranto. *People* v. *The Attorney General*, 22 Barb. 114; 3 Abbott, 131.

13. A mandate is the proper remedy to compel the proper officer to administer the oath of office to a party entitled to enter upon that office. *Ex parte Ackleys*, 4 Abbott, 35.

468. The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy, in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

1. A mandate will not lie, where there is any other specific, speedy and adequate remedy. *People* v. *Olds*, 3 Cal. 167; *Draper* v. *Noteware*, 7 ib. 276; *People* v. *Dikeman*, 7 How. Pr. 124.

2. A mandate will not be issued where an appeal will lie for the same purpose. *Ludlum* v. *Judge of the Fourth Judicial District*, 9 Cal. 7.

3. To supersede the remedy by mandamus, a party must not only have a specific, adequate, legal remedy, but one competent to afford relief upon the very subject matter of his application. *Fremont* v. *Crippen*, 10 ib. 211.

4. Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by mandamus, since it cannot compel a specific act to be done, and is not therefore equally convenient, beneficial and effectual. Ib.

5. A mandamus will not lie against the clerk of the district court to compel him to issue execution on a money judgment. He is liable on his bond. *Goodwin* v. *Glazer*, ib. 333.

6. A mandamus directing a board of supervisors to proceed and audit certain accounts of the relator, does not necessarily require the board to allow the accounts; such board have a discretion in respect to their action in this regard, though compelled to act on the subject matter of the claim; such writ does not control or prescribe the mode, or determine the result of their action. *People ex rel San Francisco Gas Co.* v. *Board of Supervisors San Francisco county*, 11 ib. 42.

7. The writ is never allowed where it appears that the relator can accomplish the result sought for by an action. *People* v. *Thompson*, 25 Barb. 73.

8. A mandate partakes of the character of a public writ, and is not allowed except for the purpose of controlling those who owe a public duty to the state in which it issues. *People* v. *Parker Vein Coal Co.*, 10 How. Pr. 543.

469. The writ shall be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ

shall be in a similar form, except that the words requiring the party to show cause why he has not done as commanded, shall be omitted, and a return day shall be inserted.

1. A demurrer does not lie to an alternative writ of mandamus. *People* v. *Harris*, 6 Abbott, 30.

470. When the application to the court is made without notice to the adverse party, and the writ be allowed, the alternative shall be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance. The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default. The case shall be heard by the court, whether the adverse party appear or not.

471. On the return of the alternative, or the day on which the application of the writ is noticed, or such further day as the court may allow, the party on whom the writ or notice may have been served, may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.

472. If an answer is made, which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of the allegation of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried shall be distinctly stated in the order for trial, and the county shall be designated in which the same shall be had. The order may also direct the jury to assess any damages which the applicant may have sustained, in case they find for him.

See section 25, of the judiciary act, post.

1. If a mandate is applied for, to compel a judge to sign a bill of exceptions, and he replies he has signed one, and it becomes a question of fact whether he signed a correct one or not; that is not such a question of fact as should be submitted to a jury. *People* v. *Judge of the Tenth Judicial District*, 9 Cal. 19.

473. On the trial, the applicant shall not be precluded by the

answer of any valid objection to its sufficiency, and may countervail it by proof, either in direct denial, or by way of avoidance.

474. If either party be dissatisfied with the verdict of the jury, he may move for a new trial upon a statement prepared as provided in section one hundred and ninety-five. The motion for a new trial may, upon reasonable notice, be brought on before the judge of the court in which the cause was tried, either in term or vacation. If a new trial be granted, the jury shall, within five days thereafter, unless the parties agree on a longer time, be summoned to try the issue. After a second verdict in favor of the same party, a new trial shall not be had.

475. If no notice for a new trial be given, or if given, be denied, the clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the court in which the application for the writ is pending, a certified copy of the verdict attached to the order of trial; after which, either party may bring on the argument of the application, upon reasonable notice to the adverse party.

476. If no answer be made, the case shall be heard on the papers of the applicant. If an answer be made which does not raise a question such as is mentioned in section four hundred and seventy-two, but only such matters as may be explained or avoided by a reply, the court may, in its discretion, grant time for replying. If the answer, or answer and reply, raise only questions of law, or put in issue immaterial statements, not affecting the substantial rights of the parties, the court shall proceed to hear, or fix a day for hearing the argument of the case.

477. If judgment be given for the applicant, he shall recover the damages which he shall have sustained, as found by the jury, or as may be determined by the court, or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue; and a peremptory mandate shall also be awarded without delay.

478. The writ shall be served in the same manner as a summons

in a civil action, except when otherwise expressly directed by order of the court.

479. When a peremptory mandate has been issued and directed to an inferior tribunal, corporation, board, or person, if it appear to the court, that any member of such tribunal, corporation, or board, or such person, upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned for a period not exceeding three months, and may make any orders necessary and proper for the complete enforcement of the writ. If a fine be imposed upon a judge or officer who draws a salary from the state or county, a certified copy of the order shall be forwarded to the comptroller, or county treasurer, as the case may be, and the amount thereof may be retained from the salary of such judge or officer. Such judge or officer, for his willful disobedience shall also be deemed guilty of a misdemeanor in office.

TITLE XIII.

OF CONTEMPTS AND THEIR PUNISHMENTS.

480. The following acts or omissions shall be deemed contempts:

1st. Disorderly, contemptuous, or insolent behavior towards the judge whilst holding court, or engaged in his judicial duties at chambers, or towards referees or arbitrators whilst sitting on a reference or arbitration, tending to interrupt the due course of a trial, reference or arbitration, or other judicial proceeding;

2d. A breach of the peace, boisterous conduct, or violent disturbance in presence of the court, or its immediate vicinity, tending to interrupt the due course of a trial, or other judicial proceeding;

3d. Disobedience or resistance to any lawful writ, order, rule or process, issued by the court or judge at chambers;

4th. Disobedience of a subpœna duly served, or refusing to be sworn or answer as a witness;

5th. Rescuing any person or property in the custody of any officer, by virtue of an order of process of such court or judge at chambers.

1. 3d. The power of the court to punish as for a criminal contempt, "willful disobedience," should not be exercised unless the acts constituting the alleged contempt are clearly proved and constitute a positive violation of the plain terms of the process or order. *Weeks* v. *Smith*, 3 Abbott, 211.

2. The court has the inherent power in a general sense of punishing as for contempt, disobedience to orders made by judges out of court. *Wickes* v. *Dresser*, 4 Abbott, 93; 13 How. Pr. 331.

3. 4th. A person cannot be deemed guilty of contempt for disobedience to the process of the court, who trespasses upon a party put in possession under execution, as the authority of the court has then ceased. *Loring* v. *Illsley*, 1 Cal. 24.

481. When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order shall be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court, or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators.

1. Courts are exclusive judges of their own contempts, but a party cannot be imprisoned for neglecting or refusing to do what appears to be out of his power to perform. *People* v. *Turner*, 1 Cal. 152; *Adams* v. *Haskell*, 6 ib. 316; *Ex parte Cohen*, ib. 318; *Ex parte Rowe*, 7 ib. 175.

2. A statement that R. was committed for contempt in refusiug to answer certain questions propounded to him by the grand jury, is not a compliance with the section. The questions asked should be set out. *Ex parte Rowe*, 7 Cal. 181.

482. When a contempt is not committed in immediate view and presence of the court or judge, a warrant of attachment may be issued to bring the person charged to answer, or without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment shall be issued without such previous attachment to answer, or such notice or order to show cause.

483. [1859.*] *Whenever a warrant of attachment is issued pursuant to this chapter, the court or judge shall direct by an endorsement on such warrant, that the person charged may be let to bail for his appearance in an amount to be specified in such endorsement.*

484. Upon executing the warrant of attachment, the sheriff shall keep the person in custody, bring him before the court or judge, and detain him until an order be made in the premises, unless the person arrested entitle himself to be discharged, as provided in the next section.

485. When a direction to let the person arrested to bail, is contained in the warrant of attachment, or endorsed thereon, he shall be discharged from the arrest, upon executing and delivering to the officer, at any time before the return day of the warrant, a written undertaking, with two sufficient sureties, to the effect that the person arrested will appear on the return of the warrant and abide the order of the court or judge thereupon; or they will pay as may be directed, the sum specified in the warrant.

486. The officer shall return the warrant of arrest and undertaking, if any, received by him from the person arrested, by the return day specified therein.

487. When the person arrested has been brought up or appeared, the court or judge shall proceed to investigate the charge, and shall hear any answer which the person arrested may make to the same, and may examine witnesses for or against him, for which an adjournment may be had from time to time, if necessary.

488. Upon the answer and evidence taken, the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that he is guilty of the contempt, a fine may be imposed on him not exceeding five hundred dollars, or he may be imprisoned not exceeding five days, or both.

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* Statutes of 1859, 139.

489. When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act shall be specified in the warrant of commitment.

1. If a party be imprisoned for contempt in not answering questions pertinent in an action, he will be discharged when that action has abated. *Ex parte Rowe*, 7 Cal. 175.

490. Persons proceeded against according to the provisions of this chapter, shall also be liable to indictment for the same misconduct, if it be an indictable offense; but the court before which a conviction is had on the indictment, in passing sentence, shall take into consideration the punishment before inflicted.

491. When the warrant of arrest has been returned served, if the person arrested do not appear on the return day, the court or judge may issue another warrant of arrest, or may order the undertaking to be prosecuted, or both. If the undertaking be prosecuted, the measure of damages in the action shall be the extent of the loss or injury sustained by the aggrieved party, by reason of the misconduct for which the warrant was issued, and the costs of the proceeding.

492. Whenever, by the provisions of this chapter, an officer is required to keep a person, arrested on a warrant of attachment, in custody, and to bring him before a court or judge, the inability, from illness or otherwise, of the person to attend shall be a sufficient excuse for not bringing him up; and the officer shall not confine a person arrested upon the warrant in a prison, or otherwise restrain him of personal liberty, except so far as may be necessary to secure his personal attendance.

1. Where an order of the district court, fining and imprisoning for contempt, does not specify on its face wherein the contempt consisted, it will be reversed on certiorari. *Ex parte Field*, 1 Cal. 187.

493. The judgment and orders of the court or judge, made in cases of contempt, shall be final and conclusive. The punishment shall be by fine or imprisonment, but no fine shall exceed the sum of five hundred dollars, and no imprisonment shall exceed the period of five days, except as provided in section four hundred and eighty-nine.

1. This order is not liable to be reviewed by a higher tribunal, except to examine whether it is a proper case for contempt. *Ex parte Cohen*, 5 Cal. 494; *Ex parte Rowe*, 7 Cal. 181; *Ware* v. *Robinson*, 9 ib. 109.

2. Under the writ of habeas corpus, the appellate court cannot review the orders of another court in cases of contempt. *Ex parte Cohen*, 5 Cal. 494.

TITLE XIV.

OF COSTS.

494. [1853, 1855.*] The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties. But there shall be allowed to the prevailing party in any action in the supreme court, district courts and county courts, his costs and necessary disbursements in the action, or special proceeding in the nature of an action.

1. An attorney has no lien on a judgment for his fee. *Ex parte Kyle*, 1 Cal. 331; *Noxon* v. *Gregory*, 5 How. Pr. 339; *Benedict* v. *Harlow*, ib. 347.

2. Counsel fees, when stipulated, are a mere incident of the judgment, and should be annexed to the costs. *Carrierre* v. *Minturn*, 5 Cal. 435; *Gronfier* v. *Minturn*, ib. 492.

495. [1853.†] Costs shall be allowed of course to the plaintiff upon a judgment in his favor, in the following cases:

1st. In an action for the recovery of real property;

2d. In an action to recover the possession of personal property, when the value of the property amounts to two hundred dollars or over. Such value shall be determined by the jury, court or referee, by whom the action is tried;

3d. In an action for the recovery of money or damages where plaintiff recovers two hundred dollars or over;

4th. In a special proceeding in the nature of an action.

See section 255.

1. Where a remittitur is sent down, the clerk of the district court may issue execution for costs. *Mayor of Marysville* v. *Buchanan*, 3 Cal. 212.

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* Statutes of 1855, 250. † Statutes of 1853, 276.

2. The plaintiff is bound by his statement of the value of the property, if no other is found by the court, and costs will be taxed accordingly. *Edgar* v. *Gray*, 5 Cal. 267.

3. In an action to try the right to the use of water and for damages for diverting it, when judgment is given for less than two hundred dollars, it will carry costs. *Marius* v. *Bicknell*, 10 Cal. 217.

4. Where a plaintiff recovers less than two hundred dollars, but extinguishes a counter claim set up in the answer, which exceeds that amount, neither party is entitled to costs. *Kalt* v. *Lignot*, 3 Abbott, 33, 190.

5. Where the plaintiff, on a recovery of less than the statutory amount, is precluded from recovering costs, the defendant is entitled to costs of course. *Landsberger* v. *Magnetic Telegraph Co.*, 8 Abbott, 35.

496. When several actions are brought on one bond, undertaking, promissory note, bill of exchange, or other instrument in writing, or in any other case for the same cause of action, against several parties who might have been joined as defendants in the same action, no costs shall be allowed to the plaintiff in more than one of such actions, which may be at his election, if the party proceeded against in the other actions were, at the commencement of the previous action, openly within this state; but the disbursements of the plaintiff shall be allowed to him in each section [action].

497. Costs shall be allowed, of course, to the defendant, upon a judgment in his favor in the actions mentioned in section four hundred and ninety-five, and in a special proceeding in the nature of an action.

1. Where several defendants are sued and judgment obtained by plaintiff against a part only, the others who obtain judgment against the plaintiff, are entitled to costs. *Daniels* v. *Lyons*, 5 Selden, 549; *Hinds* v. *Myers*, 4 How. Pr. 356; *Cuyler* v. *Coats*, 10 ib. 141.

2. Where several defendants defend successfully by different attorneys who are partners, but one bill of costs can be allowed; but otherwise, if they are not partners. *Collomb* v. *Caldwell*, 5 How. Pr. 336; *Crofts* v. *Rockefeller*, 6 ib. 9.

3. It appearing upon the trial of an action brought against seven defendants, that five of them only were liable, the plaintiff moved to strike out the names of the other two. Motion granted, with the condition that he pay their costs: and judgment rendered in favor of the two for their costs, and against the five for the debt and costs. The allowance of costs to the two defendants severed, sustained on appeal. The proper form of judgment in such a case. *Marks* v. *Bard*, 1 Abbott, 63.

498. In other actions than those mentioned in section four hundred and ninety-five, costs may be allowed, or not; and if allowed, may be apportioned between the parties, on the same or adverse sides,

in the discretion of the court; but no costs shall be allowed in an action for the recovery of money or damages when the plaintiff recovers less than two hundred dollars, nor in an action to recover the possession of personal property, when the value of the property is less than two hundred dollars.

1. Costs are an incident of the judgment to be taxed by the clerk or court, and cannot be given by the jury as damages where less than two hundred dollars is recovered. *Shay* v. *Tuolumne Water Co.*, 6 Cal. 289.

2. An action brought after an irregular levy and sale, to enjoin the parties from perfecting the sale, and to recover damages for the injury already done, is one of those actions in which costs are in the discretion of the court. *Sunny* v. *Roach*, 4 Abbott, 16.

499. When there are several defendants in the actions mentioned in section four hundred and ninety-five, not united in interest, and making separate defenses by separate answers, and the plaintiff fails to recover judgment against all, the court shall award costs to such of the defendants as have judgment in their favor.

1. In an action for tort against two, where there is a verdict in favor of one defend ant, and in favor of the plaintiff against the other defendant, the defendant prevailing, is entitled, of course, to costs under this section. *Decker* v. *Gardiner*, 4 Seld. 29.

2. Where there is but one set of papers, one argument and one judgment, there is but one appeal, and the successful party is entitled to but one bill of costs, notwithstanding that the several adverse parties appeared by different attorneys. *Everson* v. *Gehrman*, 2 Abbott, 413.

500. In the following cases the costs of an appeal shall be in the discretion of the court;

1st. When a new trial is ordered;

2d. When a judgment is modified.

1. Where a judgment was affirmed in part, and reversed in part, the respondent was allowed his costs in the court below, but was required to pay the costs of appeal. *Cole* v. *Swanston*, 1 Cal. 51.

See Rule XXXI.

501. [1853, 1855.*] Repealed.

502. [1853, 1855.*] Repealed.

503. [1853, 1855.*] Repealed.

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* Statutes of 1855, 250.

504. The fees of referees shall be five dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation, and thereupon such rate shall be allowed.

505. [1855.*] When an application is made to a court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

506. When, in an action for the recovery of money only, the defendant alleges in his answer, that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff shall not recover costs, but shall pay costs to the defendant.

1. Evidence of waiver of tender by opposite party, is competent and sufficient to support the averment of tender. *Holmes* v. *Holmes*, 5 Seld. 525.

2. The answer must aver a readiness still to pay the tender; it is an essential part of the plea. *Kortright v. Cady*, 23 Barb. 490; 5 Abbott, 358.

3. It is very doubtful if a tender can now be made after suit brought, unless in the form of section three hundred and ninety, an *offer* to take judgment. *Thurston* v. *Marsh*, 14 How. Pr. 572.

507. In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court shall direct the same to be paid by the plaintiff or defendant, personally, for mismanagement or bad faith in the action or defense.

508. When the decision of a court of inferior jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review in any other way than by appeal, the same costs shall be allowed

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* Statutes of 1855, 250.

as in cases on appeal, and may be collected by execution, or in such manner as the court may direct, according to the nature of the case,

509. [1859.*] *On the commencement of an action, the plaintiff, and on the filing of notice of appeal from a final judgment, the appellant, shall pay to the clerk three dollars; each clerk shall keep an account of all money so received, and shall pay over the same, at the end of each month, to the county treasurer, taking his receipt for the same. It shall be the duty of the district attorney, at the commencement of each month, to examine the books of the clerk and the receipts of the treasurer, and if found correct, shall execute a certificate to the auditor to that effect, whereupon the auditor shall charge the treasurer therewith. All moneys received by the treasurer under the provisions of this section, shall be paid into the state treasury as other state revenues. Any officer who shall neglect or refuse to comply with the provisions of this section, shall be deemed guilty of a misdemeanor, and shall be fined in a sum not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding two months, or by both such fine and imprisonment.*

510. [1855.†] The party in whose favor judgment is rendered, and who claims his costs, shall deliver to the clerk of the court within two days after the verdict or decision of the court, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, which memorandum shall be verified by the oath of the party, or his attorney, stating that the items are correct, and that the disbursements have been necessarily incurred in the action or proceeding.

1. For amendment, or re-taxation of costs. *Burnham* v. *Hays*, 3 Cal. 115.

511. The clerk shall include in the judgment entered up by him, the costs, the per centage allowed, and any interest on the verdict from the time it was rendered.

1. This section does not apply to causes tried on appeal in the supreme court. The costs upon an appeal are properly the costs in this court, and the costs of making up the appeal in the court below, including the cost of making out the transcript. Where

* Statutes of 1859, 224. † Statutes of 1855, 250.

a case is remanded for further proceedings, and costs awarded in this court in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the event of the suit. *Gray* v. *Palmer*, 11 Cal. 341.

512. When the plaintiff in an action resides out of the state, or is a foreign corporation, security for the costs and charges which may be awarded against such plaintiff, may be required by the defendant. When required, all proceedings in the action shall be stayed until an undertaking, executed by two or more persons, be filed with the clerk, to the effect that they will pay such costs and charges as may be awarded against the plaintiff by judgment, or in the progress of the action, not exceeding the sum of three hundred dollars. A new or an additional undertaking may be ordered by the court or judge, upon proof that the original undertaking is insufficient security, and proceedings in the action stayed until such new or additional undertaking be executed and filed.

1. The plaintiff in replevin gave an undertaking, when the defendant, under section one hundred and four, gave another undertaking, and claimed a return of the property: held, that the plaintiff, a non-resident, must file a new bond for the costs on motion. *Gelch* v. *Barbaby*, 1 Bosworth, 657; 7 Abbott, 19.

2. The defendant has the right to security for costs only, where all the plaintiffs are non-residents. *Ten Broeck* v. *Reynolds*, 13 How. Pr. 462.

3. A foreign government suing in a court of the state, may be required to file security for costs. *Republic of Mexico* v. *Arrangois*, 3 Abbott, 470.

4. Where plaintiffs have once put in security for costs required by statute, they cannot be ordered to file new security, although the security on the original undertaking became insolvent. *Hartford Quarry Co.* v. *Pendleton*, 4 Abbott, 460.

5. A plaintiff who is a non-resident at the time of commencing his action, is not excused from filing security for costs by the fact that he afterwards became a resident. *Ambler* v. *Ambler*, 8 ib. 340.

513. Each of the sureties on the undertaking mentioned above, shall annex to the same an affidavit that he is a resident and householder or freeholder within the county, and is worth double the amount specified in the undertaking, over and above all his just debts and liabilities, exclusive of property exempt from execution.

514. After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking as required has been filed, the court or judge may order the action to be dismissed.

TITLE XV.

OF MOTIONS, ORDERS, NOTICES, SERVICE OF PAPERS, AND MISCELLANEOUS PROVISIONS.

515. Every direction of a court or judge made or entered in writing and not included in a judgment, is denominated an order. An application for an order is a motion.

See section 25, of the judiciary act, post.

1. If a party to an action proceeds upon an order made in a cause, or accepts any benefit under it, he will be precluded from asking its review. *Radway* v. *Graham*, 4 Abbott, 468.

516. Motions shall be made in the county in which the action is brought, or in an adjoining county in the same district.

1. Where the statute speaks of a motion, it means written notice, or notice in open court, of which a minute is made by the clerk. *Borland* v. *Thornton*, 12 Cal. 441.

517. [1853.*] When a written notice of a motion is necessary, it shall be given, if the court be held in the same district with both parties, five days before the time appointed for the hearing, otherwise ten days; but the court, or judge, or county judge, may prescribe a shorter time.

See section 531.

1. A slight error in the title of the cause, when there is no other suit pending between the parties, will not invalidate the notice. *Mills* v. *Dunlap*, 3 Cal. 94.

2. Statutes fixing the time for filing papers in a cause, are merely directory, and the court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. *Wood* v. *Fobes*, 5 ib. 62.

3. Defective papers served should be immediately returned, or notice given to the party from whom they are received, that they will be disregarded; a delay of five or six days will be construed into an acceptance. *Wright* v. *Forbes*, 1 How. Pr. 240;

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* Statutes of 1853, 276.

Cortland Mutual Insurance Co. v. *Lathrop*, 2 How. Pr. 146; *Knickerbocker* v. *Loucks*, 3 ib. 64; *Levi* v. *Jakeways*, 4 ib. 126.

518. When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought.

519. Written notices and other papers, when required to be served on the party or attorney, shall be served in the manner prescribed in the next three sections, when not otherwise provided; but nothing in this title shall be applicable to original or final process, or any proceedings to bring a party into contempt.

1. Service of a notice or other papers on a Sunday, is irregular and void. *Field* v. *Park*, 20 John. 140.

2. An order returnable on Sunday is a nullity. A party is not justified in disobeying an order because the affidavits required were not also served. *Arctic Fire Ins. Co.* v. *Hicks*, 7 Abbott, 204.

520. The service may be personal, by delivery to the party or attorney, on whom the service is required to be made, or it may be as follows:

1st. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open, so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same enclosed in an envelope, into the post-office, directed to such attorney;

2d. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion; and if his residence be not known, by putting the same, enclosed in an envelope, into the post-office, directed to such party.

521. Service by mail may be made, where the person making the

service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

1. When the paper is thus deposited in the proper post-office, correctly addressed and postage paid, the service is deemed complete, and the party to whom it is addressed takes the risk of the failure of the mail. *Jacobs* v. *Hooker*, 1 Barb. 71; *Schenck* v. *McKie*, 4 How. Pr. 246; *Lawler* v. *Saratoga Mutual Ins. Co.*, 2 Code R. 114.

522. In case of service by mail, the notice or other paper shall be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid. And in such case, the time of service shall be increased one day for every twenty miles distance between the place of deposit and the place of the address.

1. Giving notice by mail is depositing a letter containing the requisite information, properly addressed, into the post-office. *Vassar* v. *Camp*, 14 Barb. 341.

523. A defendant shall be deemed to appear in an action when he answers, demurs, or gives the plaintiff a written notice of his appearance, or when an attorney gives notice of appearance for him. After appearance, a defendant or his attorney shall be entitled to notice of all subsequent proceedings, of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail.

1. When a motion is made to dismiss, upon an irregular appearance, and is overruled, and defendant answers, it is not to be considered as such an appearance as waives the irregularity. *Deidesheimer* v. *Brown*, 8 Cal. 339.

524. When a plaintiff or a defendant, who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, shall be upon the attorney instead of the party, except of subpœnas, of writs, and other process issued in the suit, and of papers to bring him into contempt.

1. Where a party changes his attorneys in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record. *Grant* v. *White*, 6 Cal. 55.

2. It is irregular to serve papers in the cause upon the attorney, after he becomes a non-resident. *Diefendorf* v. *House*, 9 How. Pr. 243.

525. Successive actions may be maintained upon the same contract or transaction, whenever, after the former action, a new cause of action arises therefrom.

526. Whenever two or more actions are pending at one time between the same parties, and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated into one.

1. This may be on the motion of plaintiff or defendant. *Briggs* v. *Gaunt*, 4 Duer, 664.

527. An action may be brought by one person against another, for the purpose of determining an adverse claim which the latter makes against the former, for money or property, upon an alleged obligation; and also against two or more persons, for the purpose of compelling one to satisfy a debt due to the other, for which the plaintiff is bound as security.

1. The provisions of this section sustained. *King* v. *Hall*, 5 Cal. 82.

528. The clerk shall keep among the records of the court, a register of actions. He shall enter therein the title of the action, with brief notes under it, from time to time, of all papers filed, and proceedings had therein.

529. When there are three referees, or three arbitrators, all shall meet, but two of them may do any act which might be done by all.

530. The time within which an act is to be done, as provided in this act, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

1. *Easton* v. *Chamberlain*, 3 How. Pr. 412; *Dayton* v. *McIntyre*, 5 ib. 117; 3 Code R. 164; *Taylor* v. *Corbiere*, 8 How. Pr. 385.

2. A notice served on Saturday for Monday, is not a notice of two days. *Whipple* v. *Williams*, 4 ib. 28.

531. An affidavit, notice, or other paper, without the title of the action or proceeding in which it is made, or with a defective title, shall be as valid and effectual for any purpose, as if duly entitled, if it intelligibly refer to such action or proceeding.

1. A slight error in the title of the cause, when there is no other suit pending between the parties, will not invalidate the notice. *Mills* v. *Dunlap*, 3 Cal. 94.

2. Statutes fixing the time for filing papers in a cause, are merely directory, and the court has it always in its power, in the exercise of a proper discretion, to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. *Wood* v. *Fobes*, 5 ib. 62.

3. Defective papers served should be immediately returned, or notice given to the party from whom they are received, that they will be disregarded; a delay of five or six days will be construed into an acceptance. *Wright* v. *Forbes*, 1 How. Pr. 240; *Cortland Mutual Insurance Co.* v. *Lathrop*, 2 ib. 146; *Knickerbocker* v. *Loucks*, 3 ib. 64; *Levi* v. *Jakeways*, 4 ib. 126.

4. On a motion to vacate an order, where the affidavits intelligibly refer to the action, an objection that the affidavits are entitled in the wrong court will be disregarded. *Blake* v. *Locy*, 1 Code R., N. S., 406.

532. When a cause of action has arisen in another state, or in a foreign country, and by the laws thereof an action thereon cannot there be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of a citizen thereof, who has held the cause of action from the time it accrued.

TITLE XVI.

OF PROCEEDINGS IN CIVIL CASES IN JUSTICES' COURTS.

CHAPTER I.

OF THE PARTIES, AND THE TIME AND PLACE OF COMMENCING ACTIONS IN JUSTICES' COURTS.

533. [1860.*] *The provisions of title one of this act, as to parties to actions, shall be applicable to actions of which a justice's court has jurisdiction; also, the provisions of this act from section three hun-*

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* Statutes of 1860, 000.

dred and seventeen to section three hundred and thirty-two, both sections inclusive, are hereby made applicable to justices' courts, the word "justice" being substituted for the word "clerk," and the word "constable" for the word "sheriff."

534. Parties in justices' courts may prosecute or defend in person, or by attorney; and any person, on the request of a party, may act as his attorney, except that the constable by whom the summons or jury process was served, shall not appear or act on the trial in behalf of either party.

535. [1853.*] No person shall be held to answer to any summons issued against him from a justice's court, in a civil action, in any township or city other than the one in which he shall reside, except in the cases following:

1st. When there shall be no justice's court for the township or city in which the defendant may reside, or no justice competent to act on the case;

2. When two or more persons shall be jointly, or jointly and severally bound in any debt or contract, or otherwise jointly liable in the same action, and reside in different townships or different cities of the same county, or in different counties, the plaintiff may prosecute his action in a justice's court of the township or city in which any of the debtors or other persons liable may reside;

3d. In cases of injury to the person, or to real or personal property, the plaintiff may prosecute his action in the township or city where the injury was committed;

4th. When personal property unjustly taken or detained is claimed, or damages therefor are claimed, the plaintiff may bring his action in any township or city in which the property may be found, or in which the property was taken;

5th. When the defendant is a non-resident of the county, he may be sued in any township or city wherein he may be found.

6th. When a person has contracted to perform any obligation at a particular place, and resides in another township or city, he may be

* Statutes of 1853, 276.

sued in the township or city in which such obligation is to be performed, or in which he resides;

7th. When the foreclosure of a mortgage or the enforcement of a lien upon personal property is sought by the action, the plaintiff may sue in the township or city where the property is situated;

8th. Any person or persons residing in the city of San Francisco, may be held to answer to any summons issued against him or them from the court of a justice for any township within the corporate limits of the city of San Francisco, in any action or proceeding whereof justices of the peace of the city or county of San Francisco have or may have jurisdiction by law; provided, nothing herein shall be construed to allow any justice of said city or county to hold a court in any other township than the one for which he shall have been elected.

536. Judgment upon confession may be entered up in any justice's court in the state, specified in the confession.

1. A confession for an amount exceeding the jurisdiction, is a nullity. *Feillett* v. *Engler*, 8 Cal. 76; *Daniels* v. *Hinkston*, 5 How. Pr. 322; *Griswold* v. *Sheldon*, 1 Code R., N. S., 261.

2. A confession of judgment before a justice who is father in-law to the plaintiff, is illegal on the ground of relationship. *Chapin* v. *Churchill*, 12 How. Pr. 367.

537. Justices' courts shall have jurisdiction of an action upon the voluntary appearance of the parties without summons, without regard to their residences, or the place where the cause of action arose, or the subject matter of the action may exist.

CHAPTER II.

SUMMONS, ARREST, ATTACHMENT AND CLAIM OF PERSONAL PROPERTY.

538. Actions in justices' courts shall be commenced by filing a copy of the account, note, bill, bond, or instrument upon which the action is brought, or a concise statement in writing of the cause of action, and the issuance of a summons thereon, or by the voluntary appearance and pleadings of the parties without summons. In the

latter case, the action shall be deemed commenced at the time of appearance.

539. When a guardian is necessary, he shall be appointed by the justice, as follows:

1st. If the infant be plaintiff, the appointment shall be made before the summons is issued, upon the application of the infant, if he be of the age of fourteen years or upwards; if under that age, upon the application of some relative or friend. The consent in writing of the guardian to be appointed, and to be responsible for costs, if he fail in the action, shall be first filed with the justice;

2d. If the infant be defendant, the guardian shall be appointed at the time the summons is returned, or before the pleadings. It shall be the right of the infant to nominate his own guardian, if the infant be over fourteen years of age, and the proposed guardian be present and consent in writing to be appointed. Otherwise, the justice may appoint any suitable person who gives such consent.

540. The summons shall be addressed to the defendant by name, or if his name be unknown, by a fictitious name; and shall summon him to appear before the justice at his office, naming its township or city; and at a time specified therein, to answer the complaint of the plaintiff, for a cause of action therein described, in general terms, sufficient to apprize the defendant of the nature of the claim against him; and in an action for money or damages, shall state the amount for which the plaintiff will take judgment, if the defendant fail to appear and answer. It shall be subscribed by the justice before whom it is returnable.

541. [1854.*] The time mentioned in the summons for the appearance of the defendant and the time of service shall be as follows;

1st. When the summons is accompanied with an order to arrest the defendant, it shall be returnable immediately;

2d. When the defendant is not a resident of the township or city, or when the plaintiff is not a resident, it shall be returnable not more

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* Statutes of 1854, 84.

than two days from its date, and shall be served at least one day before the time for appearance;

3d. In all other cases, it shall be returnable in not less than two, nor more than ten days from its date, and shall be served at least two days before the time for appearance.

1. 3d. A summons issued on February 3d and returnable on the 14th, is irregular, being more than ten days. *Deidesheimer* v. *Brown*, 8 Cal. 339.

542. The summons shall be served by the sheriff or a constable of the county, as follows:

1st. If the action be against a corporation, by a delivery of a copy to the president or other head of the corporation, or to the secretary, cashier or managing agent thereof; or when no such officer resides in the county, to a director resident therein;

2d. If against a minor under the age of fourteen years, by delivery of a copy to such minor, and also to his father, mother, or guardian; or if there be none within the county, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is;

3d. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, and for whom a guardian has been appointed, by delivery of a copy to such guardian;

4th. In all other cases, by delivery of a copy to the defendant personally.

1. The constable may appoint deputies. *Taylor* v. *Brown*, 4 Cal. 188.

2. To give a justice jurisdiction and to authorize him to render judgment against an absent defendant, there must be a return showing personal service of process. *Manning* v. *Johnson*, 7 Barb. 457.

3. The return of a constable certifying the time and manner of his serving a summons upon the defendant, is presumptive evidence of what it states. *Wheeler* v. *New York & Harlem R. R. Co.*, 24 Barb. 414.

543. [1854.*] When the person upon whom the service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affi

* Statutes of 1854, 84.

davit, to the satisfaction of the justice, and it shall, in like manner, appear that a cause of action exists against the defendant in respect to whom the service is to be made, the justice shall grant an order that service be made by the publication of the summons. The order shall direct the publication to be made in a newspaper, to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least one week: provided, that a publication against a defendant residing out of the state or absent therefrom, shall not be less than three months. The service of summons shall be deemed complete at the expiration of the time prescribed by the order of publication; the justice shall also direct a copy of the summons to be forthwith deposited in the post office, directed to the person to be served, at his place of residence.

1. The affidavit for an order of publication, must show diligence in ascertaining the whereabouts of the defendant, if unknown, as the law presumes nothing in favor of the jurisdiction in a justice's court. *Swain* v. *Chase*, 12 Cal. 283.

544. An order to arrest the defendant may be endorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable, at the time of serving the summons, and brought before the justice, and there detained until duly discharged, in the following cases, arising after the passage of this act:

1st. In an action for the recovery of money or damages, on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state, with intent to defraud his creditors; or where the action is for a willful injury to the person, or for taking, detaining or injuring personal property;

2d. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use by an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity;

3d. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought;

4th. When the defendant has removed, concealed, or disposed of his property, or is about to do so, with intent to defraud his creditors. But no female shall be arrested in any action.

1. The provisions of arrest for willful injury to person or character, are in conflict with the constitution. *Ex parte Prader*, 6 Cal. 239.

2. If the warrant is not valid on its face, the justice who issues and the officer who execute it, are liable to the party arrested. *Williams* v. *Garrett*, 12 How. Pr. 456.

545. Before an order for an arrest shall be made, the party applying shall prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts on which the application is founded. The plaintiff shall also execute and deliver to the justice a written undertaking, with two or more sureties, to the effect that if the defendant recover judgment, the plaintiff will pay to him all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least two hundred dollars.

546. The defendant, immediately upon being arrested, shall be taken to the office of the justice who made the order, and if he be absent or unable to try the action, or if it be made to appear to him by the affidavit of the defendant, that he is a material witness in the action, the officer shall immediately take the defendant before the next justice of the city or township, who shall take cognizance of the action, and proceed thereon, as if the summons had been issued and the order of arrest made by him.

See section 562.

547. The officer making an arrest shall immediately give notice thereof to the plaintiff, or his attorney or agent, and endorse on the summons, and subscribe a certificate, stating the time of serving the same, the time of the arrest, and of his giving notice to the plaintiff.

548. The officer making the arrest shall keep the defendant in custody until duly discharged by order of the justice.

549. The defendant under arrest, on his appearance with the officer, may demand a trial immediately; and upon such demand being made, the trial shall not be delayed beyond three hours, except by the trial of another action pending at the time; or he may have an adjournment, and be discharged on giving bail, as provided in the next section. An adjournment at the request of the plaintiff, beyond three hours, shall discharge the defendant from arrest, but the action

may proceed, notwithstanding; and the defendant shall be subject to arrest on the execution, in the same manner as if he had not been so discharged.

See section 582.

550. If the defendant on his appearance demand an adjournment, the same shall be granted, on condition that he execute and file with the justice an undertaking, with two or more sufficient sureties, to be approved by the justice, to the effect that he will render himself amenable to the process of the court during the pendency of the action, and such as may be issued to enforce the judgment therein; or that the sureties will pay to the plaintiff the amount of any judgment which he may recover in the action. On filing the undertaking specified in this section, the justice shall order the defendant to be discharged from custody.

551. [1858, 1860.*] *In an action upon a contract, express or implied, made after the passage of this act, for the direct payment of money, which contract is made or is payable in this state, and is not secured by mortgage, lien or pledge upon real or personal property, the plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as hereinafter provided.*

552. [1858.*] A writ to attach the property of the defendant shall be issued by the justice, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in section one hundred and twenty-one of this act.

1. This section was not amended so as to authorize an attachment upon a contract made prior to the passage of this act, or against non-residents, as in section one hundred and twenty.

553. [1858, 1860.*] *Before issuing the writ, the justice shall require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, to the effect that if the defendant recover judg-*

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* Statutes of 1860, 000. † Statutes of 1858, 132.

ment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the attachment.

1. Proceedings on an attachment bond are void, if the justice takes the bond in an amount exceeding his jurisdiction. *Benedict* v. *Bray*, 2 Cal. 251.

554. The writ may be directed to the sheriff or any constable of the county, and shall require him to attach and safely keep all the property of the defendant in his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the complaint, unless the defendant give him security by the undertaking of two sufficient sureties, in an amount sufficient to satisfy such demand besides costs; in which case, to take such undertaking.

555. The sections of this act, from section one hundred and twenty-four, to section one hundred and forty-one, both inclusive, shall be applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff," whenever the writ is directed to a constable, and the word "justice" being substituted for the word "judge."

556. The plaintiff in an action to recover the possession of personal property, may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him, as provided in this chapter.

557. When a delivery is claimed, an affidavit shall be made by the plaintiff, or by some one in his behalf, showing:

1st. That the plaintiff is the owner of the property claimed, (particularly describing it) or is lawfully entitled to the possession thereof;

2d. That the property is wrongfully detained by the defendant;

3d. The alleged cause of the detention thereof, according to his best knowledge, information and belief;

4th. That the same has not been taken for a tax, assessment, or fine, pursuant to statute, or seized under an execution or an attachment against the property of the plaintiff, or if seized, that it is by statute exempt from such seizure; and,

5th. The actual value of the property.

558. The justice shall thereupon, by an endorsement in writing upon the affidavit, order the sheriff or a constable of the county, to take the same from the defendant, and deliver it to the plaintiff, upon receiving the undertaking mentioned in the following section.

1. This section has not been amended so as to give the party or his attorney, the authority to require the taking of the property as in section one hundred and one.

559. Upon the receipt of the affidavit, and order, with a written undertaking, executed by two or more sufficient sureties, approved by the officer, to the effect that they are bound in double the value of the property as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum, as may, for any cause, be recovered against the plaintiff, the officer shall forthwith take the property described in the affidavit, if it be in possession of the defendant, or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, order and undertaking, by delivering the same to him personally, if he can be found within the county, or to his agent from whose possession the property is taken, or if neither can be found within the county, by leaving them at the usual place of abode of either within the county, with some person of suitable age and discretion, or if neither have any known place of abode within the county, by putting them in the nearest post-office directed to the defendant.

560. The defendant may, within two days after the service of a copy of the affidavit and undertaking, give notice to the officer that he excepts to the sufficiency of the sureties; if he fails to do so, he shall be deemed to have waived all objection to them. When the defendant excepts, the sureties shall justify on notice before the justice; and the officer shall be responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify. If the defendant except to the sureties, he cannot reclaim the property as provided in the next section.

561. At any time before the delivery of the property to the plaintiff, the defendant may, if he do not except to the sureties of the plaintiff, require the return thereof, upon giving to the officer a written

undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may for any cause be recovered against the defendant. If a return of the property be not so required within two days after the taking and service of notice to the defendant, it shall be delivered to the plaintiff, except as provided in this chapter.

1. This undertaking, being provided for the benefit of the real owner of the property as well as of the plaintiff, must be in double the value of the property and not merely double the amount of the debt for which the writ of attachment was issued. *Kamena* v. *Wanner*, 6 Abbott, 193.

562. The defendant's sureties, upon reasonable notice to the plaintiff, shall justify before the justice; and upon such justification, the officer shall deliver the property to the defendant. The officer shall be responsible for the defendant's sureties until they justify, or until the justification is completed or expressly waived, and may retain the property until that time; but if they, or others in their place, fail to justify at the time appointed, he shall deliver the property to the plaintiff.

563. If the property, or any part thereof, be concealed in a building or enclosure, the officer shall publicly demand its delivery, and if it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession.

564. When the officer shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary expenses for keeping the same.

565. If the property taken be claimed by any other person than the defendant or his agent, and such person make affidavit of his title thereto, or right to the possession thereof, stating the grounds of such title or right, and serve the same upon the officer, the officer shall not be bound to keep the property, or deliver it to the plaintiff, unless the plaintiff, on demand of him or his agent, indemnify the officer against such claim, by an undertaking executed by two sufficient sureties,

accompanied by their affidavits that they are each worth double the value of the property as specified in the affidavit of the plaintiff, over and above their debts and liabilities, exclusive of property exempt from execution, and are freeholders or householders of the county; and no claim to such property by any other person than the defendant or his agent shall be valid against the officer, unless so made.

566. The officer shall return the order and affidavit, with his proceedings thereon, to the justice, within five days after taking the property mentioned therein.

567. The qualification of sureties on the several undertakings required by this chapter, shall be as follows:

1st. Each of them shall be a resident and householder, or freeholder, within the county;

2d. Each shall be worth double the amount stated in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution.

568. For the purpose of justification, each of the sureties shall attend before the justice at the time mentioned in the notice, and may be examined on oath, on the part of the adverse party, touching his sufficiency, in such manner as the justice, in his discretion, may think proper. The examination shall be reduced to writing and subscribed by the sureties, if required.

569. If the justice find the sureties sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and file the same, and the officer shall thereupon be exonerated from liability.

CHAPTER III.

PLEADINGS AND TRIAL.

570. The pleadings in justices' courts shall be:

1st. The complaint by the plaintiff, stating the cause of action;

2d. The answer by the defendant, stating the ground of the defense.

571. The pleading shall be in writing, and verified by the oath of the party, his agent or attorney, when the action is:

1st. For the foreclosure of any mortgage or the enforcement of any lien on personal property;

2d. For a forcible or unlawful entry upon, or a forcible or unlawful detention of lands, tenements, or other possessions;

3d. To recover possession of a "mining claim." In other cases the pleading may be oral or in writing.

1. 2d. The rule that a penal statute must be declared upon by the party seeking recovery under it, does not apply to pleadings in a justice's court. *O'Callaghan* v. *Booth*, 6 Cal. 63; *Hart* v. *Moon*, ib. 161.

2. This jurisdiction is not unconstitutional. Ib.

572. When the pleadings are oral, the substance of them shall be entered by the justice in his docket; when in writing, they shall be filed in his office, and a reference made to them in the docket. Pleadings shall not be required to be in any particular form, but shall be such as to enable a person of common understanding to know what is intended.

1. It is not the policy of the law to confine parties to any nice strictness in pleading. *Cronise* v. *Carghill*, 4 Cal. 120.

573. The complaint shall state in a plain and direct manner, the facts constituting the cause of action.

574. The answer may contain a denial of any of the material facts stated in the complaint, which the defendant believes to be untrue, and also a statement, in a plain and direct manner, of any other facts constituting a defense, or a counter claim, upon which an action may be brought by the defendant against the plaintiff in a justice's court.

1. The objection to the jurisdiction on the ground of excess of value of the subject in controversy, is properly taken by answer, and should be determined before proceeding to hear the merits of the action. *Small* v. *Gwin*, 6 Cal. 447.

575. A statement in an answer that the party has not sufficient knowledge or information, in respect to a particular allegation in the previous pleading of the adverse party, to form a belief, shall be deemed equivalent to a denial.

576. When the cause of action or counter claim arises upon an

account or instrument for the payment of money only, it shall be sufficient for the party to deliver a copy of the account or instrument to the court, and to state that there is due to him thereupon, from the adverse party, a specified sum, which he claims to recover or set off. The court may, at the time of the pleading, require that the original account or instrument be exhibited to the inspection of the adverse party, and a copy to be furnished; or if it be not so exhibited and a copy furnished, may prohibit its being afterwards given in evidence.

1. Where, in an action on contract, the plaintiff recovers less than fifty [$200] dollars, but extinguishes a counter claim set up in the answer which exceeds that amount, neither party is entited to costs. *Kalt* v. *Lignot*, 3 Abbott, 33, 190.

577. [1854.*] If the plaintiff annex to his complaint, or file with the justice at the time of issuing the summons, a copy of the promissory note, bill of exchange, or other written obligation for the payment of money, upon which the action is brought, the defendant shall be deemed to admit the genuineness of the signatures of the makers, endorsers, or assignors thereof, unless he specifically deny the same in his answer, and verify the answer by his oath.

578. Either party may object to a pleading of his adversary, or to any part thereof, that it is not sufficiently explicit to enable him to understand it, or that it contains no cause of action or defense, although it be taken as true. If the court deem the objection well founded, it shall order the pleading to be amended, and if the party refuse to amend, the defective pleading shall be disregarded.

1. A justice of the peace has the right to allow a complaint to be amended in all respects, so that the case may be determined on its merits; and this, whether the defect be in the statement of jurisdiction or any other fact. The greatest liberality and indulgence should be extended in all such applications. *Linhart* v. *Buiff*, 11 Cal. 280.

2. On demurrer to a complaint in an action in a justice's court, if the objection is deemed well taken, the judge should order the pleading to be amended, and if it is not amended, should disregard it. *Glasse* v. *Keulsen*, 3 Abbott, 100.

579. A variance between the proof on the trial and the allegations in a pleading, shall be disregarded as immaterial, unless the court

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* Statutes of 1854, 84.

be satisfied that the adverse party has been misled to his prejudice thereby.

580. The pleadings may be amended at any time before the trial, to supply a deficiency or omission, when by such amendment substantial justice will be promoted. If the amendment be made after the issue, and it be made to appear to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment shall be granted. The court may also, in its discretion, require as a condition of an amendment, the payment of costs to the adverse party, to be fixed by the court, not exceeding twenty dollars; but such payment shall not be required unless an adjournment is made necessary by the amendment; nor shall an amendment be allowed after a witness is sworn on the trial, when an adjournment thereby will be made necessary.

1. The greatest liberality should be extended to amend pleadings, when they will tend to the furtherance of justice. *Butler* v. *King*, 10 Cal. 342.

2. Where an action is commenced before a justice, and the answer of defendant interposes a plea of title, and an action for the same cause is commenced in an upper court, the cause must be governed by the rules of pleading and practice by which other actions are conducted in this court. *Jewett* v. *Jewett*, 6 How. Pr. 185.

3. In an action in a justice's court, after the defendant had commenced his proofs, the cause was adjourned by consent. On the adjourned day the plaintiff failed to appear; the justice, however, proceeded with the cause, and rendered judgment for the defendant upon his counter claim: held, that the justice erred in proceeding with the action. The only judgment proper in such cases is judgment of non-suit or dismissal. *Norris* v. *Bleakley*, 3 Abbott, 107.

4. Where in a justice's court, after the justice had called his cases, a defendant who was in waiting asked his cause to be called, and was informed that there was no such cause, whereupon he left the court: held, that the justice could not afterwards proceed with the cause in defendant's absence. *Murling* v. *Grote*, ib. 109.

5. Where a justice adjourned a cause with provision, that if defendant filed security meantime, he should then have further adjournment, and defendant filed the security but failed to appear on the adjourned day: held, that the justice was right in proceeding to judgment. *Muber* v. *Held*, ib. 110.

581. The parties shall not be at liberty to give evidence by which the question of title to real property shall be raised on the trial before a justice; and if it appear from the plaintiff's own showing on the trial, or from the answer of the defendant, verified by his oath, or that of his agent or attorney, that the determination of the action will

necessarily involve the decision of a question of title to real property, the justice shall suspend all further proceedings in the action, and certify the pleadings, or if the pleadings be oral, a transcript of the same, from his docket to the district court of the county; and from the time of filing such pleadings or transcript with the county clerk, the district court shall have over the action the same jurisdiction as if it were originally commenced therein. Provided, that when the pleadings or transcript are certified to the district court upon the answer of the defendant, he shall file an undertaking with two or more sufficient sureties, to be approved by the justice, to the effect that they will pay all costs of the action, if it be decided against him by the district court.

1. Justices of the peace have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted. *Hill* v. *Newman*, 5 Cal. 445.

2. Justices have no jurisdiction in actions to recover damages for injury to a mining claim, or for its detention. *Van Etten* v. *Jilson*, 6 ib. 19.

3. Occupancy of a reservation by indians is a title upon which a justice of the peace cannot pass in an action. *Smith* v. *Mitten*, 13 How. Pr. 325.

582. [1853.*] If at any time before the trial it appear, to the satisfaction of the justice before whom the action is brought, by affidavit of either party, that such justice is a material witness for either party, or if either party make affidavit that he has reason to believe, and does believe, that he cannot have a fair and impartial trial before such justice, by reason of the interest, prejudice, or bias of the justice, the action shall be transferred to some other justice of the same or neighboring township; and in case a jury be demanded, and affidavit of either party is made, that he cannot have a fair and impartial trial, on account of the bias or prejudice of the citizens of the township against him, the action shall be transferred to some other justice of the peace in the county. The justice to whom an action may be transferred by the provisions of this section, shall have and exercise the same jurisdiction over the action as if it had been originally commenced before him. The justice ordering the transfer of the action to another justice, shall immediately transmit to the latter, on payment of costs,

* Statutes of 1853, 276.

all the papers in the action, together with a certified transcript from his docket, of the proceedings therein.

Upon the return day of the summons, if a jury be required, or if the justice be actually engaged in other official business, he may adjourn the trial without the consent of either party, as follows:

1st. When a party who is not a resident of the county is in attendance, the adjournment not to exceed twenty-four hours; when the defendant in attendance is under arrest, the adjournment not to exceed three hours;

2d. In other cases, not to exceed five days.

See section 546.

1. When the justice is interested in the event of the suit, the statute requires he should transfer it to another justice. *Larue* v. *Gaskins*, 5 Cal. 507.

2. Where the plaintiff discovers that the justice and defendant are related, and on that ground withdraws the suit, the justice cannot render judgment for his costs. *Randall* v. *Hall*, Lalor's Supp. 239.

3. The affidavit must show that the justice is a necessary, as well as a material witness, and the justice has no right to judge of its sufficiency. *Board of Commissioners* v. *Doherty*, 16 How. Pr. 46.

583. [1854.*] The trial may be adjourned by consent, or upon application of either party, without the consent of the other, for a period not exceeding ten days, (except as provided in the next section) as follows:

1st. The party asking the adjournment shall, if required by his adversary, prove by his own oath, or otherwise, that he cannot, for want of material testimony, which he expects to procure, safely proceed to trial, and shall show in what respect the testimony expected is material, and that he has used due diligence to procure it, and has been unable to do so;

2d. The party asking the adjournment shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before the justice, which shall accordingly be done, and the testimony so taken may be read on the trial, with the same effect, and subject to the same objections as if the witness were produced. But such objections shall be made at the time of taking the deposition;

* Statutes of 1854, 84.

3d. The court may also require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed.

584. [1854.*] An adjournment may be had, either at the time of joining issue, or at any subsequent time, to which the case may stand adjourned, on application of either party, for a period longer than ten days, but not to exceed four months, from the time of the return of summons, upon proof by the oath of the party, or otherwise, to the satisfaction of the justice, that such party cannot be ready for trial before the time to which he desires an adjournment, for want of material evidence, particularly describing it, and that the delay has not been made necessary by any act of negligence on his part since the action was commenced; that he has used due diligence to procure the evidence, and has been unable to do so, and that he expects to procure the evidence at the time stated by him: provided, that if the adverse party admit that such evidence would be given, and consent that it may be considered as given on the trial, or offered and overruled as improper, the adjournment shall not be had.

585. No adjournment shall be granted for a period longer than ten days, upon the application of either party, except upon condition that such party file an undertaking, with sureties, to be approved by the justice, to the effect that they will pay to the opposite party the amount of any judgment which may be recovered against the party applying.

586. If the plaintiff fail to appear at the return day of the summons, the action shall be dismissed. If the defendant fail to appear at the return day of the summons, or if either party fail to attend at a day to which the trial has been adjourned, or fail to make the necessary pleading or proof on his part, the case may, nevertheless, proceed at the request of the adverse party, and judgment shall be given in conformity with the pleadings and proofs.

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* Statutes of 1854, 84.

587. A trial by jury shall be demanded at the time of joining issue, and shall be deemed waived if neither party then demand it. When demanded, the trial of the case shall be adjourned until a time and place fixed for the return of the jury. If neither party desire an adjournment, the time and place shall be determined by the justice, and shall be on the same day, or within the next two days. The jury shall be summoned upon an order of the justice, from the citizens of the city or township, and not from the bystanders.

1. Where a party demands a jury trial in a justice's court, and neglects to appear on the adjourned day, the justice may proceed and hear the cause without a jury. *Kilpatrick* v. *Carr*, 3 Abbott, 117.

588. At the time appointed for the trial, the justice shall proceed to call, from the jurors summoned, the names of the persons to constitute the jury for the trial of the issue. The jury, by consent of the parties, may consist of any number not more than twelve nor less than three.

589. If a sufficient number of competent and indifferent jurors do not attend, the justice shall direct others to be summoned from the vicinity, and not from the bystanders, sufficient to complete the jury.

590. Either party may challenge the jurors. The challenges shall be either peremptory or for cause. Each party shall be entitled to three peremptory challenges. Either party may challenge for cause, on any grounds set forth in section one hundred and sixty-two. Challenges for cause shall be tried by the justice in a summary manner, who may examine the juror challenged, and witnesses.

CHAPTER IV.

JUDGMENT AND EXECUTION.

591. Judgment that the action be dismissed without prejudice to a new action, may be entered with costs in the following cases:

1st. When the plaintiff voluntarily dismisses the action before it is finally submitted;

2d. When he fails to appear at the time specified in the summons, or upon adjournment, or within one hour thereafter;

3d. When it is objected at the trial, and appears by the evidence, that the action is brought in the wrong county, or township, or city; but if the objection be taken and overruled, it shall be cause only of reversal on appeal, and shall not otherwise invalidate the judgment; if not taken at the trial, it shall be deemed waived, and shall not be cause of reversal.

592. When the defendant fails to appear and answer, judgment shall be given for the plaintiff, as follows:

1st. When a copy of the account, note, bill, or other obligation upon which the action is brought, was filed with the justice at the time the summons was issued, judgment shall be given without further evidence, for the sum specified in the summons;

2d. In other cases, the justice shall hear the evidence of the plaintiff, and render judgment for such sum only as shall appear by the evidence to be just; but in no case exceeding the amount specified in the summons.

1. Where a justice, by statements which are untrue, that defendant is not intending to appear, is induced to take up a cause at an unusual time, *e. g.*, while engaged in the trial of another cause, a judgment rendered by him in favor of the plaintiff will be reversed. *Beach* v. *McCann*, 4 Abbott, 18.

593. Upon issue joined, if a jury trial be not demanded, the justice shall hear the evidence, and decide all questions of fact and of law, and render judgment accordingly.

594. [1854.*] Upon a verdict, the justice shall immediately render judgment accordingly. When the trial is by the justice, judgment shall be entered immediately after the close of the trial; if the defendant has been arrested and is still in custody; in other cases, it shall be entered within four days after the close of the trial; if the action be on contract against two or more defendants, and the summons is served on one or more, but not on all, the judgment shall be entered up only against those who were served, if the contract be a several or a joint

* Statutes of 1854, 84.

and several contract; but if the contract be a joint contract only, the judgment shall be entered up against all the defendants, but shall only be enforced against the joint property of all, and the separate property of the defendants served.

595. When the amount found due to either party exceeds the sum for which the justice is authorized to enter judgment, such party may remit the excess, and judgment may be rendered for the residue.

596. If the defendant at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and if he recover, deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery otherwise than as to costs, as above provided.

1. If the tender is made after a suit is brought, it must be accompanied with the costs then accrued. *People* v. *Banker*, 8 How. Pr. 258.

597. When a judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, it shall be so stated in the judgment and entered in the docket.

598. When the prevailing party is entitled to costs by this chapter, the justice shall add their amount to the verdict; or in case of a failure of the plaintiff to recover, or in case of a dismissal of the action, shall enter up judgment in favor of the defendant for the amount of such costs.

599. [1854.*] The justice, on demand of the party in whose favor judgment is rendered, shall give him a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the county clerk, shall be noted by him thereon, and entered in the docket; and from that time executions may be issued by the county

* Statutes of 1854, 84.

clerk on such judgments to the sheriff of any other county of the state, in the same manner as upon judgments recovered in the higher courts. All process upon judgments recovered in justices' courts, to be executed within the same county, shall be issued by the justice or his successors in office. No judgment rendered by a justice of the peace shall create any lien upon any lands of the defendant, unless a transcript of such judgment, certified by the justice, shall be filed and recorded in the office of the recorder. When such transcript is to be filed in any other county than that in which the justice resides, such transcript shall be accompanied with the certificate of the county clerk as to the official character of the justice. When so filed and recorded in the office of the recorder for any county, such judgment shall constitute a lien upon, and bind the lands and tenements of the judgment debtor, situated in the county where such transcript may be filed and recorded, in favor of such judgment creditor, as if such judgment had been rendered in the district court of such county.

600. Execution for the enforcement of a judgment in a justice's court may be issued, on the application of the party entitled thereto, at any time within five years from the entry of judgment.

1. Unless an execution issue within five years, the judgment is void; nor will the loss of the justice's docket prevent the time from running. *White* v. *Clark*, 8 Cal. 512.

601. The execution, when issued by a justice, shall be directed to the sheriff or to a constable of the county, and subscribed by the justice by whom the judgment was rendered, or by his successor in office, and shall bear date the day of its delivery to the officer to be executed. It shall intelligibly refer to the judgment by stating the names of the parties, and the name of the justice before whom, and of the county, and the township or city where, and at the time when, it was rendered; the amount of judgment, if it be for money; and if less than the whole is due, the true amount due thereon. It shall contain, in like cases, similar directions to the sheriff or constable as are required by the provisions of title VII, of this act, in an execution to the sheriff.

602. [1854.*] The sheriff or constable to whom the execution is

* Statutes of 1854, 84.

directed, shall proceed to execute the same in the same manner as the sheriff is required by the provisions of title VII, of this act, to proceed upon executions directed to him; and the constable, when the execution is directed to him, shall be vested for that purpose with all the powers of the sheriff; and after issuing an execution, and either before or after its return, (if the same be returned unsatisfied either in whole or in part) the judgment creditor shall be entitled to an order from the justice, requiring the judgment debtor to attend at a time to be designated in the order, and answer concerning his property before such justice, and the attendance of such debtor may be enforced by the justice. On his attendance, such debtor may be examined under oath concerning his property; and any person alleged to have in his hands property, moneys, effects or credits of the judgment debtor, may also be required to attend and be examined, and the justice may order any property in the hands of the judgment debtor, or any other person, not exempt from execution, belonging to such debtor, to be applied towards the satisfaction of the judgment, and the justice may enforce such order by imprisonment until complied with; but no judgment debtor or other person shall be required to attend before the justice out of the county in which he resides.

CHAPTER V.

GENERAL PROVISIONS.

603. [1853, 1854.*] Those provisions of this act, which are referred in this title, and no other, shall, in addition to the provisions embraced in this title, be applicable to justices' courts and proceedings therein.

604. [1855.†] Every justice shall keep a book denominated a "docket," in which he shall enter:

1st. The title of every action or proceeding;

2d. The object of the action or proceeding, and if a sum of money be claimed, the amount of the demand;

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* Statutes of 1854, 84. † Statutes of 1855, 196.

3d. The date of the summons, and the time of its return; and if an order to arrest the defendant be made, or a writ of attachment be issued, a statement of these facts;

4th. The time when the parties or either of them appear, or their non-appearance, if default be made; a minute of the pleadings and motions; if in writing, referring to them; if not in writing, a concise statement of the material parts of the pleading, and of all motions made during the trial by either party, and his decisions thereon;

5th. Every adjournment, stating on whose application, whether on oath, evidence, or consent, and to what time;

6th. The demand for a trial by jury, when the same is made, and by whom made; the order for the jury, and the time appointed for the trial and return of the jury;

7th. The names of the jury who appear and are sworn; the names of all witnesses sworn, and at whose request;

8th. The verdict of the jury, and when received; if the jury disagree, and are discharged, the fact of such disagreement and discharge;

9th. The judgment of the court, specifying the costs included, and the time when rendered;

10th. The issuing of the execution, when issued, and to whom; the renewals thereof, if any, and when made; and a statement of any money paid to the justice, and when, and by whom;

11th. The receipt of a notice of appeal, if any be given, and of the appeal bond, if any filed.

605. The several particulars of the last section specified shall be entered under the title of the action to which they relate, and at the time when they occur. Such entries in a justice's docket, or a transcript thereof, certified by the justice or his successor in office, shall be primary evidence to prove the facts so stated therein.

606. A justice shall keep an alphabetical index to his docket, in which shall be entered the names of the parties to each judgment, with a reference to the page of entry. The names of the plaintiffs shall be entered in the index, in the alphabetical order of the first letter of the family names.

607. It shall be the duty of every justice, upon the expiration of his term of office, to deposit with his successor his official dockets, as well his own as those of his predecessors, which may be in his custody, to be kept as public records. If the office of a justice become vacant by his death, or removal from the township or city, or otherwise, before his successor is elected and qualified, the dockets in possession of such justice shall be deposited with the county clerk of the county, to be by him delivered to the successor in office of the justice.

608. [1855.*] Any justice with whom the docket of his predecessor is deposited, may issue execution or other process, upon a judgment there entered and unsatisfied, in the same manner and with the same effect as the justice by whom the judgment was entered might have done. In case of the creation of a new county, or the change of the boundary between two counties, any justice into whose hands the docket of a justice formerly acting as such within the same territory may come, shall, for the purposes of this section, be considered the successor of said former justice.

609. The justice elected to fill a vacancy shall be deemed the successor of the justice whose office became vacant before the expiration of a full term. When a full term expires, the same or another person elected to take the office in the same township, or city, from that time shall be deemed the successor.

610. When two or more justices are equally entitled under the last section to be deemed the successors in office of a justice, the county judge shall, by a certificate, subscribed by him and filed in the office of the county clerk, designate which justice shall be the successor of a justice going out of office, or whose office has become vacant.

611. The summons, execution, and every other paper made or issued by a justice, except a subpœna, shall be filled up without a blank left to be filled by another, otherwise it shall be void.

612. In case of the sickness, or other disability, or necessary

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* Statutes of 1855, 303.

absence of a justice on a return of a summons, or at the time appointed for a trial, another justice of the same township or city may, at his request, attend in his behalf, and shall thereupon become vested with the power, for the time being, of the justice before whom the summons was returnable. In that case, the proper entry of the proceedings before the attending justice, subscribed by him, shall be made in the docket of the justice before whom the summons was returnable. If the case be adjourned, the justice before whom the summons was returnable may resume jurisdiction.

613. [1860.*] *The justice may, at the request of a party, and on being satisfied that it is expedient, specially depute any discreet person of suitable age, and not interested in the action, to serve a summons or execution, with or without an order to arrest the defendant, or with or without a writ of attachment. The said justice shall be liable on his official bond for all official acts of the person so deputed. Such deputation shall be in writing on the process.*

1. The constable may appoint deputies. *Taylor* v. *Brown*, 4 Cal. 188.

614. The person so deputed shall have the authority of a constable in relation to the service, execution and return of such process, and shall be subject to the same obligations.

615. A constable, notwithstanding the expiration of his term of office, may proceed and complete the execution of all final process which he has begun to execute, in the same manner as if he still continued in office, and his sureties shall be liable to the same extent.

616. A justice may punish as for contempt, persons guilty of the following acts, and no other:

1st. Disorderly, contemptuous, or insolent behavior towards the justice while holding the court, tending to interrupt the due course of a trial, or other judicial proceeding;

2d. A breach of the peace, boisterous conduct, or violent disturbance in the presence of the justice, or in the immediate vicinity of the

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* Statutes of 1860, 000.

court held by him, tending to interrupt the due course of a trial, or other judicial proceeding;

3d. Disobedience or resistance to the execution of a lawful order or process, made or issued by him;

4th. Disobedience to a subpœna duly served, or refusing to be sworn, or answer as a witness;

5th. Rescuing any person or property in the custody of any officer, by virtue of an order or process of the court held by him.

617. When a contempt is committed in the immediate view and presence of the justice, it may be punished summarily, for which an order shall be made reciting the facts, as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the justice, a warrant of arrest may be issued by such justice, on which the person so guilty may be arrested and brought before the justice immediately, when an opportunity to be heard in his defense or excuse shall be given. The justice may thereupon discharge him, or may convict him of the offense. A justice may punish for contempts by fine or imprisonment, or both; such fine not to exceed in any case one hundred dollars, and such imprisonment one day.

618. The conviction, specifying particularly the offense and the judgment thereon, shall be entered by the justice in his docket.

619. Justices of the peace may issue subpœnas in any action or proceeding in the courts held by them, and final process on any judgment recovered therein, to any part of the county.

620. Justices of the peace may issue commissions to take the depositions of witnesses out of this state, and settle interrogatories to be annexed thereto, and direct the manner in which the commissions shall be returned. The provisions of title XI, of this act, so far as the same are consistent with the jurisdiction and powers of justices' courts, shall be applicable to justices' courts, and to actions and proceedings therein.

621. In actions respecting "mining claims," proof shall be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action.

1. Actual possession of a portion of a mining claim, according to the custom of miners in a given locality, extends by construction to the limits of the claim held in accordance with such customs. *Hicks* v. *Bell*, 3 Cal. 219.

2. This provision would seem to imply a permission on the part of the state to the miner, to seek wherever he chose in the gold bearing districts for the precious metals. *McClintock* v. *Bryden*, 5 ib. 97.

3. A nuisance working a common injury to those in possession of mining grounds, may be peaceably abated by those injured. *Styles* v. *Laird*, ib. 120.

4. The policy of the state in conferring the privilege of working the mines, equally confers the right to divert the streams from their natural channels. *Irwin* v. *Phillips*, ib. 140.

5. The occupation of a lot for the purpose of hotel keeping is not inconsistent with the policy of the state with regard to mining claims. Facilities for the business of mining should be reasonably protected. *Fitzgerald* v. *Urton*, ib. 308.

6. The right to mine for precious metals can only be exercised upon public lands, and although it carries with it the incidents to the right, such as the use of wood and water, those incidents must also be of the public domain. *Tartar* v. *Spring Creek W. and M. Co.*, ib. 395.

7. In a controversy between two mining companies, it was competent to prove the execution of certain receipts for water purchased by the plaintiffs, as tending to show the existence of the company, and that it had actually located and was in operation at the time the receipts purport to be signed. *Lone Star Co.* v. *West Point Co.*, ib. 447.

8. It is to be construed as an action to recover possession of a mining claim, where the value does not exceed two hundred dollars, but confers no jurisdiction to give damages for an injury thereto, or for its detention. *Van Etten* v. *Jilson*, 6 ib. 19; *Small* v. *Gwinn*, ib. 447; *Freeman* v. *Powers*, 7 ib. 104.

9. Where the complaint alleges an injury to the mining claim, and a prayer for damages, the latter should be disregarded or stricken out, and the plaintiff be allowed to try his right to the claim. *Van Etten* v. *Jilson*, 6 ib. 19; *Grass Valley M. Co.* v. *Stackhouse*, ib. 413.

10. The statute making the possessory rights of settlers on public lands for agricultural or grazing purposes, yield to the rights of miners, has legalized what would otherwise be a trespass, but it cannot be extended to a class of cases not especially provided for. *Burdge* v. *Underwood*, ib. 45.

11. A miner has no right to dig within an enclosure surrounding a dwelling house or other improvements of another. Ib.

12. The fact that the parties in possession of a gold mine are foreigners and have obtained no license, affords no apology for trespassers. *Mitchell* v. *Hagood*, ib. 148.

13. Mining laws, when introduced in evidence, are to be construed by the court,

and the question whether by virtue of such laws a forfeiture had accrued, is a question of law, and cannot therefore be properly submitted to a jury. *Fairbanks* v. *Woodhouse*, 6 Cal. 433.

14. In the absence of mining rules, the fact that a party has located a claim bounded by another, raises no implication that they correspond in size or direction of lines. *Live Yankee Co.* v. *Oregon Co.*, 7 ib. 40.

15. A bill of sale, not under seal, is insufficient to convey a mining claim. *McCarron* v. *O'Connell*, ib. 152.

16. The owner of a mining claim has, in practical effect, a good vested title to the property in the mine, and should be so treated until his title is divested by the exercise of the higher right of his superior proprietor. *Merced Mining Co.* v. *Fremont*, ib. 317.

17. An appropriation of public land carries with it all the privileges and incidents of ownership, against every one but the government, subject only to rights antecedently acquired. *Crandall* v. *Woods*, 8 ib. 136.

18. A verbal lease of a mining claim cannot be enforced against the claim of a purchaser without notice of the lease. *Jenkins* v. *Redding*, ib. 598.

19. One party may locate the same ground for fluming purposes; and another party, at the same or a different time, may locate for mining purposes; and that the two locations, being for different purposes, will not conflict. *O'Keiffe* v. *Cunningham*, 9 ib. 589.

20. Where a company appropriate the ground covered by their tailings, and while continuing to hold and claim the same, they are molested in their possession, damages may be recovered by them for the trespass. The places of depositing the tailings must, however, be claimed as such. *Jones* v. *Jackson*, ib. 237.

21. Efforts to procure machinery, with the bona fide intent to work the claim, may be justly considered as work done upon the claim by relation and intendment, and will avoid an apparent abandonment. *Packer* v. *Heaton*, ib. 568.

22. Where parol evidence is given of certain regulations of miners, and on cross-examination it appears that the regulations were in writing, the proper course to pursue, if any objection is taken to the evidence, is by motion to strike it out. *Kiler* v. *Kimball*, 10 ib. 267.

23. A bill of sale for a mining claim, not under seal, and without warranty, which only purports to convey to the vendee the right, title and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. Such a bill only passes an equity, which is subject to the legal title or any superior equity. In such a case, the purchaser takes the risk of any infirmities or defects of title which may exist. The doctrine of *caveat emptor* applies to all such cases. *Clark* v. *McElvy*, 11 ib. 154.

24. In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants in such action, who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for. It is only necessary, in such case, for the plaintiff to sue the party who interferes with his rights. *Waring* v. *Crow*, 11 ib. 366.

25. Where the court instructed the jury in such action, that "where an abandon-

ment is sought to be established by the act of the party, the intention alone governs; and if such a party leave a mining claim, with the intention not to return, his abandonment is as complete, if it exist for a minute or a second, as though it continued for years; but if he left with the intention of returning, he might do so at any time within five years; provided, there was no rule, usage or custom of miners of such a notorious character as to raise a presumption of an intention to abandon:" held, that the question of abandonment was fairly left to the jury. The purchaser of a mining claim can only acquire, by such purchase, such right or title as his vendor had at the time of sale. *Waring* v. *Crow*, 11 Cal. 366.

26. Possession of one partner or tenant, in common, of a mining claim, is the possession of all. Where the tenant in common, or partner, goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment; nor does his refusal to pay, or delay in paying the expenses of the business, or the assessments, create of itself a forfeiture. Where a party's rights to a mining claim are fixed by the rules of property, which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. Ib.

27. The right of a mining claim vests by the taking in accordance with local rules. *McGarrity* v. *Byington*, 12 ib. 426.

28. In an action for injuries to a mining claim, a claim for damages, by reason of breaking away of defendant's dam and the washing away of pay dirt, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler* v. *Sear's Union Water Co.*, ib. 555.

622. A new trial may be granted by the justice, on motion, within ten days after the entry of the judgment, for any one of the following causes:

1st. Accident or surprise, which ordinary prudence could not have guarded against;

2d. Excessive damages, appearing to have been given under the influence of passion; or,

3d. Insufficiency of the evidence to justify the verdict or other decision;

4th. Newly discovered evidence material for the party making the application, which he could not with reasonable diligence have discovered and produced at the time.

623. The application shall be made upon affidavit and notice. The affidavit shall be filed with the justice, with a statement of the grounds upon which the party intends to rely. The adverse party may use counter affidavits on the motion, provided they be filed one day previous to the hearing of the motion.

624. [1853, 1854.*] Any party dissatisfied with a judgment rendered in a justice's court, may appeal therefrom to the county court of the county, at any time within thirty days after the rendition of the judgment. The appeal shall be taken by filing a notice of appeal with the justice, and serving a copy on the adverse party. The notice shall state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.

1. Service on the attorney is deemed service on the adverse party. *Welton* v. *Garibaldi*, 6 Cal. 245; *Coulter* v. *Stark*, 7 ib. 224.

2. A justice has jurisdiction to grant appeals and to stay proceedings thereupon; and his action cannot be reviewed upon certiorari. *Coulter* v. *Stark*, 7 Cal. 224.

3. A mistake in the notice that the judgment was entered on the 4th of July, instead of the 2d of July, is not material. *Sherman* v. *Rolberg*, 9 ib. 17.

4. There is no appeal from a judgment by default, upon questions of fact alone, as no issue was raised thereupon. *People* v. *County Court of El Dorado county*, 10 ib. 19.

5. If the party against whom judgment is rendered, consents that it be opened and the cause tried, a subsequent judgment rendered against such party will be regular. *Scranton* v. *Levy*, 4 Abbott, 21.

6. Where the notice does not state the grounds upon which the appeal is founded, the county court is bound to affirm the judgment. *Derby* v. *Hannin*, 5 ib. 150.

625. [1853, 1854, 1855.†] When a party appeals to the county court on questions of law alone, he shall, within ten days after the rendition of the judgment, prepare a statement of the case, and file the same with the justice. The statement shall contain the grounds upon which the party intends to rely on the appeal, and so much of the evidence as may be necessary to explain the grounds, and no more. Within ten days after he receives notice that the statement is filed, the adverse party, if dissatisfied with the same, may file amendments; the proposed statement and amendments shall be settled by the justice; and if no amendments be filed, the original statement shall be adopted. The statement thus adopted, or as settled by the justice, with a copy of the docket of the justice, and all motions filed with him by the parties during the trial, and the notice of appeal, shall be used on the hearing of the appeal before the county court.

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* Statutes of 1854, 84.

† Statutes of 1855, 198.

626. [1853, 1854.*] When a party appeals to the county court on questions of fact, or on questions of both law and fact, no statement need be made, but the action shall be tried anew in the county court.

1. If default is had in the justice's court, and no issue of facts raised, and an appeal taken upon questions of law and fact, there must be a statement, as the facts are not in issue. *People* v. *County Court of El Dorado county*, 10 Cal. 19.

627. [1853, 1854, 1855.†] Upon receiving the notice of appeal, and on payment of the fees of the justice, and filing an undertaking as required in the next section, the justice shall, within five days, transmit to the clerk of the county court: if the appeal be on questions of law alone, a certified copy of his docket, the statement as admitted or as settled, the notice of appeal, and the undertaking filed; or if the appeal be on questions of fact, or both law and fact, a certified copy of his docket, the pleadings, all notices, motions and other papers filed in the cause, the notice of appeal and the undertaking filed; and the justice may be compelled by the county court, by an order entered upon motion, to transmit such papers, and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice, by the party or his attorney. In the county court, either party shall have the benefit of all legal objections made in the justice's court.

1. A justice of the peace may refuse to send up the transcript of a cause tried by him, unless all his legal fees be first paid by the appellant. *McDermott* v. *Douglass*, 5 Cal. 89; *Bray* v. *Redman*, 6 ib. 287; *People* v. *Harris*, 9 ib. 571.

2. The appeal will not be dismissed, because the justice fails to send up the notice on appeal. An order should be entered, compelling him to do so. *Sherman* v. *Rolberg*, 9 ib. 17.

3. An offer to pay, "when the papers are made out," is not sufficient to constitute a tender of the fees. The appellant must tender the justice his fees unconditionally. If the justice refuse to state the exact amount, then the appellant should offer to deposit with him such amount as he may demand as surety for the fees, when ascertained. *People* v. *Harris*, 9 ib. 571.

4. The appeal is perfected when the bond is filed and notice given. If the appeal be not prosecuted, the same may be dismissed after notice in the appellant court. The payment of fees is only a condition precedent to sending up the papers, but does not constitute a condition of appeal, but this may be waived by the justice, or the fees paid at any time, and the case brought up within the period limited by the rules of the court. Ib.

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* Statutes of 1854, 84.

† Statutes of 1855, 198.

5. The execution of the appeal bond within the statutory time, is not necessary as a condition to the jurisdiction. When from accident or mistake the parties have failed to meet the exact requirements of directory statutes, the courts allow them upon equitable terms to comply, taking care that due respect is shown to the rights of the other party. *Rabe* v. *Hamilton*, Cal. Jan. T. 1860.

6. Where a party, on appealing to the county court, executes an undertaking with sureties, and the county court reverses the judgment of the justice, and on appeal to the supreme court, that court reverses the judgment of the county court and affirms the judgment of the justice, the sureties are liable, not merely for the amount of the judgment in the county court, but for the amount recovered in the supreme court. *Smith* v. *Cronise*, 24 Barb. 671.

628. [1853, 1854, 1855, 1860.*] *An appeal from a justice's court shall not be effectual for any purpose, unless an undertaking be filed, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on the appeal, or, if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money; or twice the value of the property, including costs, when the judgment is for the recovery of specific personal property, and shall be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from, and all costs, if the appeal be withdrawn or dismissed, or the amount of any judgment and all costs that may be recovered against him in the said action in the county court. When the action is for the recovery of specific personal property, the undertaking shall be conditioned that the appellant will pay the judgment and costs appealed from, and obey the order of the court made therein, if the appeal be withdrawn or dismissed, or any judgment and costs that may be recovered against him in said action in the county court, and will obey any order made by the court therein. The undertaking shall be accompanied by the affidavits of the sureties that they are residents of the county, and are each worth the amount specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; or the bond shall be executed by a sufficient number of sureties who can justify, in the aggregate, to an amount equal to double the amount specified in the bond, or a deposit of the amount of the judgment, including all costs appealed*

* Statutes of 1860, 000.

from, or of the value of the property, including all costs in actions for the recovery of specific personal property, with the justice. And such deposit shall be equivalent to the filing of the undertaking in this act mentioned; and in such cases the justice shall transmit the money to the clerk of the county court, to be by him paid out on the order of the court. The adverse party may, however, except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they, or other sureties, justify before the justice before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal shall be regarded as if no undertaking had been given.

1. Where the appeal is bona fide and not for delay, appellate courts will always permit a new undertaking to be filed, where the original is defective. *Coulter* v. *Stark*, 7 Cal. ~~284~~ 244

2. If the bond is received without objection at the time it is presented, the bond will stand as approved. *People* v. *Harris*, 9 ib. 571.

3. The failure of a justice to state in his docket, that the summons was returned "served," will not vitiate the judgment on appeal. *Denmark* v. *Leining*, 10 ib. 93.

629. If an execution be issued, on the filing of the undertaking staying all proceedings, the justice shall, by order, direct the officer to stay all proceedings on the same. Such officer shall, upon payment of his fees for services rendered on the execution, thereupon relinquish all property levied upon, and deliver the same to the judgment debtor, together with all moneys collected from sales or otherwise. If his fees be not paid, the officer may retain so much of the property or proceeds thereof, as may be necessary to pay the same.

630. [1853, 1854.*] Repealed.

631. [1854, 1855.†] Costs shall be allowed to the prevailing party in a justice's court.

632. [1854, 1855.†] Repealed.

633. Justices of the peace shall receive from the sheriff or constables of their county, all moneys collected on any process or order

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* Statutes of 1854, 84.

† Statutes of 1855, 250.

issued by their courts respectively, and all moneys paid to them in their official capacity, and shall pay the same over to the parties entitled or authorized to receive them, without delay. For a violation of this section, they may be removed from their office and shall be deemed guilty of a misdemeanor.

634. Justices of the peace may, in all cases, require a deposit of money, or an undertaking, as security for costs of court, before issuing a summons.

635. [1860.*] *The provisions of sections thirty-two, three hundred and sixty-eight, three hundred and sixty-nine, three hundred and seventy, three hundred and seventy-one, three hundred and seventy-two, three hundred and seventy-three, five hundred and nineteen, five hundred and twenty, five hundred and twenty-three, five hundred and twenty-five, five hundred and twenty-six, five hundred and twenty-seven, five hundred and thirty-one, five hundred and thirty-two, shall be applicable to justices' courts and actions therein.*

TITLE XVII.

PROCEEDINGS IN CIVIL CASES IN RECORDERS' AND MAYORS' COURTS.

636. Civil actions in recorders' and mayors' courts shall be commenced by filing the complaint, setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation, as to enable the defendant to understand distinctly the character of the violation complained of, and to answer the complaint. The ordinance may be referred to by its title. The complaint shall be verified by the oath of the party complaining, or of his attorney or agent.

1. The recorder of the city of Sacramento has no jurisdiction in cases of forcible entry and unlawful detainer. *Cronise* v. *Carghill*, 4 Cal. 120.

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* Statutes of 1860, 000.

637. Immediately after filing the complaint, a summons shall be issued, directed to the defendant, and returnable either immediately, or at a time designated therein, not exceeding four days from the date of its issuance.

638. On the return of the summons, the defendant may plead to the complaint, or he may answer or deny the same. Such plea, answer, or denial, may be oral or in writing, and immediately thereafter the case shall be tried, unless for good cause shown, an adjournment be granted.

639. In all cases for violation of an ordinance, where the fine, forfeiture, or penalty imposed by the ordinance, is less than fifty dollars, the trial shall be by the court. In actions where the fine, forfeiture, or penalty imposed by the ordinance, is over fifty dollars, the defendant shall be entitled, if demanded by him, to a jury of six persons.

640. From a judgment in a civil action in a recorder's or mayor's court, an appeal may be taken to the county court. The appeal shall be taken and the proceedings thereon conducted in the same manner as appeals are taken from a judgment in a civil action in a justice's court, and as the proceedings thereon are conducted.

641. All proceedings in civil actions in recorders' and mayors' courts, except as herein otherwise provided, shall be conducted in the same manner as in civil actions in justices' courts.

642. The provisions of this title shall be applicable to civil actions in recorders' and mayors' courts already established, or which may hereafter be established in any incorporated city of this state.

TITLE XVIII.

MISCELLANEOUS PROVISIONS.

643. The supreme court may make rules not inconsistent with the constitution and laws of the state, for its own government, and the government of the district courts; but such rules shall not be in force until thirty days after their adoption and publication.

644. The county clerk shall be clerk of the county court, the court of sessions, and the probate court of his county.

645. If an action be brought against a sheriff for an act done by virtue of his office, and he give written notice thereof to the sureties on any bond of indemnity received by him, the judgment recovered therein shall be conclusive evidence of his right to recover against such sureties; and the court or judge in vacation may, on motion, upon notice of five days, order judgment to be entered up against them for the amount so recovered, including costs.

646. [1857.*] In the counties of Santa Clara, Santa Cruz, Monterey, San Louis Obispo, Santa Barbara, Contra Costa, Los Angeles and San Diego, it shall be the duty of the officer to give the defendant, in a civil action, if said defendant shall require it, a copy of the summons or other process in the Spanish language; and in the counties of Santa Barbara, San Luis Obispo, Los Angeles, and San Diego, Monterey and Santa Cruz, it shall be lawful, with the consent of both parties, to have the process, pleadings, and other proceedings in a cause, in the Spanish language.

647. Words used in this act in the present tense, shall be deemed to include the future as well as the present; words used in the singu-

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* Statutes of 1857, 29.

lar number shall be deemed to include the plural, and the plural the singular; writing shall be deemed to include printing or printed paper; oath to include affirmation or declaration; signature or subscription to include mark when the person cannot write, his name being written near it, and witnessed by a person who writes his own name, as a witness.

648. The following statutes, namely: the act entitled "an act to regulate proceedings in civil cases in the district court, the superior court of the city of San Francisco, and the supreme court," passed April twenty-second, eighteen hundred and fifty; the act entitled "an act to regulate proceedings against debtors by attachment," passed April twenty-second, eighteen hundred and fifty; the act entitled "an act providing for the collection of demands against vessels and boats," passed April tenth, eighteen hundred and fifty; the act entitled "an act to regulate proceedings in courts of justices of the peace in civil cases," passed April tenth, eighteen hundred and fifty; and the act entitled "an act to regulate proceedings in the county courts in cases of appeal from the courts of justices of the peace," passed April eleventh, eighteen hundred and fifty; the act entitled "an act respecting set-offs," passed [April] twenty-second, eighteen hundred and fifty, are hereby repealed; but such repeal shall not invalidate any judgment rendered, or order made, or any proceeding already taken by virtue of said statutes.

649. This act shall take effect on the first day of July, of the present year.

650. [1854.*] In all cases where an undertaking with sureties is required by the provisions of said act, the judge, justice, clerk, or other officer taking the same, shall require the sureties to accompany the same with an affidavit that they are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution; provided, that when the amount specified in the undertaking exceeds three thousand dollars, and there are more than two sureties thereon, they may state in their affidavits that they are severally worth amounts less than that expressed

* Statutes of 1854, 84.

in the undertaking, if the whole amount be equivalent to that of two sufficient sureties.

1. Plaintiffs are not bound to delay suit on an undertaking until after issue and return of the execution. *Nickerson* v. *Chatterton*, 7 Cal. 568.

2. The affidavit is sufficient, if, when fairly construed, it comply with the statute. *Taaffe* v. *Rosenthall*, 7 Cal. 514.

3. Where a mere defective undertaking has been bona fide given, and the party will file a good one before the case is submitted, a court should permit him to do so. *Coulter* v. *Stark*, 7 Cal. 244; *Bryan* v. *Berry*, 7 Cal. 130; *Cunningham* v. *Hopkins*, 8 ib. 33.

4. To support the condition of a bond, the court will transpose or reject insensible words, and construe it according to the obvious intent of the parties. But, conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and, in a suit thereon, the plaintiff would be entitled to the full amount. *Swain* v. *Graves*, ib. 549.

5. Where a party gave notice of justification between the hours of ten A. M. and five P. M. of a certain day: held, that the clerk could not take the justification until the last hour stated in the notice, in the absence of the opposite party. *Lower* v. *Knox*, 10 ib. 480.

6. Taking all our statutes together, the obvious design was to put an undertaking on the same footing as a bond. *Caulfield* v. *Bates*, Cal. July T. 1859.

7. In an action against sureties to save from a legal liability, the complaint need not aver actual damage; in such cases the legal liability is the measure of damages. *McGee* v. *Roen*, 4 Abbott, 8.

8. An attorney and counselor at law is disqualified from acting as bail. *Wheeler* v. *Wilcox*, 7 ib. 73.

9. A judgment creditor is not bound to exhaust his remedy on the judgment before enforcing the undertaking. *Heebner* v. *Townsend*, 8 ib. 235.

651. [1854, 1855.*] In actions respecting miners' claims, in a justice's court, the justice shall have power, upon application of the party out of possession of the claim or claims, after notice of one day to the adverse party, to appoint a receiver of the proceeds of the claim, pending the action. If the parties agree upon a person, he shall be appointed such receiver; if the parties do not agree, the justice shall appoint a receiver, who shall take an oath which shall be filed with the justice, that he is not interested in the action between the parties, and that he will honestly keep an account of all gold dust or metals of any kind, the proceeds of the claim or claims in dispute. After the appointment of such receiver, the justice shall have power to issue a written

* Statutes of 1855, 196.

order to any sheriff or constable, to put such receiver into possession of such claim, which order said sheriff or constable shall execute, and the receiver shall remain in possession of the claim or claims, so long as said action may remain undetermined in any court. The court in which the action may be pending, shall have the authority, upon the application of either party, with two days' notice to the other, from time to time, to make such orders for the disposition of the proceeds of such claim or claims, for the safety of the same, as may seem proper. The court in which the action may be pending, shall also have power, upon application of the receiver, based upon his affidavit, to punish as for contempt, all persons who have been guilty of disturbing the receiver in the possession of the claims.

652. [1854.*] The receiver mentioned in the last section, shall keep an accurate account of all the proceeds of the claim pending the action, and of all amounts paid out for working the same, and shall retain the proceeds and pay the same over, pursuant to the order of the court. The receiver shall also be required, on demand of either party, to give security for the faithful performance of his trust, and shall be allowed for the same a reasonable compensation, to be paid out of the proceeds of the claim in his hands, but in no case exceeding ten per cent. upon such proceeds.

653. [1854.*] Writs of certiorari and mandamus may be issued in the cases prescribed by said act, by a judge of the supreme court, district court, or county court, in vacations, and may in the discretion of the judge issuing the writ, be made returnable, and a hearing may be had on the return thereof in the vacation.

See sections 456, 467.

654. [1854.*] Whenever property has been taken by an officer, under a writ of attachment, in pursuance of the provisions of said act, and it shall be made to appear satisfactorily to the court, or a judge thereof, or a county judge, that the interest of the parties to the action will be subserved by a sale thereof, the court or judge may order such

* Statutes of 1854, 84.

property to be sold in the same manner as property is sold under an execution, and the proceeds to be deposited in court to abide the judgment in the action. Such order shall be made only upon notice to the adverse party, or his attorney, in case such party has been personally served with a summons in the action.

See sections 130, 221.

655. [1854.*] A copy of any record, document, or paper in the custody of a public officer of this state, or of the United States, within this state, certified under the official seal, or verified by the oath of such officer, to be a true, full and correct copy of the original in his custody, may be read in evidence in an action or proceeding in the courts of this state, in the like manner and with the like effect, as the original could be if produced.

See sections 448, 449.

656. [1854.*] When two or more persons associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates, but the judgment in such cases shall bind only the joint property of the associates.

657. [1854.*] All decisions given upon an appeal, in any appellate court of this state, shall be given in writing, with the reason therefor, and filed with the clerk of the court, but this section shall not apply to actions tried with a jury anew in the county court, or on appeal from a justice's court.

658. [1854.*] A defendant against whom an action is pending, upon a contract, or for specific personal property, may at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon due notice to such person, and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to

* Statutes of 1854, 84.

either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct, and the court may, in its discretion, make the order.

1. This order can only be made when it is certain that the only question is, whether the plaintiff or a third person is the true owner of the debt, fund or other property for which judgment is demanded. *Sherman* v. *Partridge*, 4 Duer, 646.

659. [1854.*] Any person shall be entitled to intervene in an action who has an interest in the matter in litigation, in the success of either of the parties to the action, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant.

1. Sustained. *Brooks* v. *Hager*, 5 Cal. 281; *Sargent* v. *Wilson*, ib. 504; *Yuba county* v. *Adams*, 7 ib. 35.

2. In an action to forclose a mortgage upon property claimed as a homestead, the wife should be allowed to intervene. *Sargent* v. *Wilson*, 5 Cal. 504; *Moss* v. *Warner*, 10 ib. 296.

3. The petition of an intervenor must be treated as a declaration or complaint. *People* v. *Talmage*, 6 ib. 256.

4. On intervention, if the proceedings between the debtor and a prior creditor are not void, but voidable, the defendant can alone object. *Dixey* v. *Pollock*, 8 ib. 570.

5. It is too late on appeal to object that certain parties could not intervene in a suit pending in the inferior court. *McKenty* v. *Gladwin*, 10 ib. 227.

6. Filing an intervention in an action to foreclose a mechanic's lien within the prescribed statutory time is precisely the same as commencing an original action. *Mars* v. *McKay*, Cal. Oct. T. 1859.

7. The motion to intervene must be made at such a time as will not necessarily delay the trial of the original cause. If the application is made too late, the court is not bound to allow it when interposed, as no injury can result to the party; the result can in no wise affect him. *Heckey* v. *Killey*, Cal. Oct. T. 1859.

660. [1854.*] A third person may intervene, either before or after issue has been joined in the cause.

661. [1854.*] The intervention shall be by petition or complaint, filed in the court in which the action is pending, and it must set forth

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* Statutes of 1854, 84.

the grounds on which the intervention rests. A copy of the petition or complaint shall be served upon the party or parties to the action against whom anything is demanded, who shall answer it as if it were an original complaint in the action.

662. [1854.*] The court shall determine upon the intervention at the same time that the action is decided; if the claim of the party intervening is not sustained, he shall pay all costs incurred by the intervention.

663. [1854.*] On the trial of any action in the court of record, either party may require the clerk to take down the testimony in writing.

1. A transcript of which, if agreed to as correct, certified by the clerk, is a substitute for a bill of exceptions or statement of facts in their absence. *Ingraham* v. *Gildemeester*, 2 Cal. 161; *Castro* v. *Amesti*, Cal. July T. 1859.

664. [1854.*] The party obtaining the postponement of a trial in any court of record, shall also, if required by the adverse party, consent that the testimony of any witness of such adverse party, who is in attendance, be then taken by deposition before a judge or clerk of the court in which the case is pending, or before such notary public as the court may indicate, which shall accordingly be done, and the testimony so taken may be read on the trial with the same effect, and subject to the same objections, as if the witness were produced.

665. [1854.*] Whenever costs are awarded to a party by an appellate court, such party may have an execution for the same, on filing a remittitur with the clerk of the court below, and it shall be the duty of such clerk, whenever the remittitur is filed, to issue the execution upon application therefor; and whenever costs are awarded to a party by an order of any court, such party may have an execution therefor in like manner as upon a judgment.

1. When a remittitur is sent down, the clerk of the district court may issue execution for costs. *Mayor of Marysville* v. *Buchanan*, 3 Cal. 212.

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* Statutes of 1854, 84.

666. [1854.*] Sections five, six, seven, fifteen, sixteen, seventeen, eighteen, nineteen and twenty, of the act entitled "an act amendatory of and supplementary to the act entitled 'an act to regulate proceedings in civil cases in the courts of justice in this state,'" passed May eighteenth, one thousand eight hundred and fifty-three, are hereby repealed, and the sections amended by said amendatory act, shall stand revived as amended by this act.

667. [1854.*] This act shall take effect on the first day of July, one thousand eight hundred and fifty-four.

1. This section refers to the amendments of 1854.

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* Statutes of 1854, 84.

AN ACT

CONCERNING THE COURTS OF JUSTICE OF THIS STATE AND JUDICIAL OFFICERS.

PASSED MAY 19th, 1853.

The People of the State of California represented in Senate and Assembly, do enact as follows:

CHAPTER I.

COURTS OF JUSTICE IN GENERAL.

1. The following shall be the courts of justice of this state: 1st. The supreme court. 2d. The district courts. 4th. The county courts. 5th. The courts of sessions. 6th. The probate courts. 7th. The justices' courts. 8th. The recorders' courts. 9th. The mayors' courts.

CHAPTER II.

THE SUPREME COURT.

2. The supreme court of this state shall consist of a chief justice and two associate justices. Each justice hereafter elected or appointed,

shall be commissioned by the governor, and before entering upon his duties, shall take the constitutional oath of office.

3. The justices of the supreme court shall be chosen at general elections by the qualified voters of the state. One of the justices shall be chosen at the general election of the year one thousand eight hundred and fifty-three, and at the general election every second year thereafter, and shall hold his office for the term of six years from the first day of January next after his election. The senior justice in commission shall be the chief justice.

4. When from any cause a vacancy shall occur in the office of a justice of the supreme court, the governor shall fill the same by granting a commission, which shall continue until the election and qualification of a justice. A justice to fill a vacancy shall be chosen at the first general election subsequent to the occurrence of the vacancy.

1. The absence of a judge from the state is not such a vacancy as can be supplied by the executive. *People* v. *Wells*, 2 Cal. 610.

5. The supreme court shall have appellate jurisdiction in all cases where the matter in dispute exceeds two hundred dollars; when the legality of any tax, toll or impost, or municipal fine is in question, and in all criminal cases amounting to felony, on questions of law alone.

1. This jurisdiction does not apply in cases of misdemeanor or crimes of a less degree than felony. *People* v. *Applegate*, 5 Cal. 295; *People* v. *Shear*, 7 ib. 139; *People* v. *Vick*, ib. 165.

6. [1854.*] The supreme court shall have jurisdiction to review upon appeal:

1st. A judgment in an action or proceeding commenced in or removed from another court to the district courts, or county courts, when the matter in dispute exceeds two hundred dollars; or when the possession or title of land or tenements is in controversy; or when the legality of any tax, toll or impost, or municipal fine is in question, and to review upon the appeal from such judgment, any intermediate order

* Statutes of 1854, 28.

or decision, involving the merits and necessarily affecting the judgment;

2d. An order granting or refusing a new trial, or refusing to change the place of trial of an action or proceeding, after a motion is made therefor in the cases provided by law, or on the ground that a judge is disqualified from hearing or trying the same, or sustaining or overruling a demurrer, or affecting a substantial right in an action or proceeding.

1. An appeal will not lie to the supreme court unless the amount involved is more than two hundred dollars. *Gordon* v. *Ross*, 2 Cal. 156.

2. This jurisdiction is in view of the constitution. *Zander* v. *Coe*, 5 ib. 230.

3. The supreme court possesses appellate jurisdiction, from a decree rendered in an action for divorce from the bonds of matrimony. *Conant* v. *Conant*, 10 ib. 249.

7. This court, and each of the justices thereof, shall have power to issue all writs necessary or proper to the complete exercise of the powers conferred by the constitution, and by this and other statutes.

1. This court has the right to compel inferior tribunals to proceed to hear and determine causes, of which they refuse to take cognizance. *Purcell* v. *McKune*, Cal. Oct. T. 1859.

8. [1854.*] This court may reverse, affirm or modify the judgment or order appealed from, as to any or all the parties, and may, if necessary, or proper, order a new trial, or the place of trial to be changed; when the judgment or order is reversed or modified, this court may make complete restitution of all property and rights lost by the erroneous judgment or order.

1. The opinion which is rendered, is advisory to the inferior court, and after the reversal of an erroneous judgment, the parties in the court below have the same rights that they originally had. *Stearns* v. *Aguirre*, 7 Cal. 443.

2. This provision does not cover the case of a judgment for the recovery of money. It applies only to those cases where the judgment operates upon specific property in such a manner, that its title is not changed, as by directing the possession of real estate, or the delivery of documents and the like. *Farmer* v. *Rogers*, 10 ib. 335.

9. There shall be four terms of this court in each year, to commence on the first Monday of January, April, July and October, and

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* Statutes of 1854, 28.

to continue until the fourth Saturday thereafter, inclusive, unless all the cases ready for hearing be sooner disposed of. If all the cases ready for hearing be not disposed of, the terms may be continued as much longer as in the opinion of the court the public interest shall require.

10. [1854.*] The presence of two justices shall be necessary for the transaction of business, excepting such business as may be done at chambers; and the concurrence of two justices who have been present at, and heard the arguments, shall be necessary to pronounce a judgment. If two who have been present at, and heard the argument, do not concur, the case shall be reheard.

11. The terms of this court shall be held at the capital of the state. If a room in which to hold the court be not provided by the state, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff of the county in which it is held to provide such room, attendants, fuel, lights and stationery, and the expense thereof shall be paid out of the state treasury.

CHAPTER III.

THE DISTRICT COURTS.

12. [1854, 1855, 1857.†] The state shall be divided into fifteen judicial districts, which districts shall be numbered, and composed of the several counties and parts of counties, as follows:

1st. The first judicial district shall be composed of the counties of San Diego, Los Angeles and San Bernardino;

2d. The second judicial district shall be composed of the counties of Santa Barbara and San Luis Obispo;

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* Statutes of 1854, 28.

† Statutes of 1857, 248.

3d. The third judicial district shall be composed of the counties of Santa Cruz, Santa Clara, Monterey and Alameda;

4th. The fourth judicial district shall be composed of that part of the northern portion of the city and county of San Francisco lying north of a line described as follows: commencing at the western boundary of said county, at a point in a line with the center of Bush street, in said city, thence running easterly in a line with and through the center of Bush street, to the center of Larkin street; thence northerly along the center of Larkin street to the center of Pine street; thence easterly along the center of Pine street to the center of Kearny street; thence northerly along the center of Kearny street to a point in a line with the northern side of the city hall or court-house; thence easterly to and along the northerly line of the city hall or court-house, to a point sixty-five feet from the easterly line of Kearny street; thence at right angles southerly to the southern line of said hall or court-house; thence westerly along the southern line of said building to the easterly line of Kearny street; thence southerly along said eastern line of Kearny street to the center of Clay street; thence easterly along the center of Clay street to a point in the eastern boundary of said county; (*a*)

5th. The fifth judicial district shall be composed of the counties of Calaveras, Amador, Tuolumne and San Joaquin; (*b*)

6th. The sixth judicial district shall be composed of the county of Sacramento;

(*a*) STATUTES OF 1854, 178.

SEC. 2. The jurisdiction of the district court of the fourth judicial district, in the county of San Francisco, and throughout the state, shall remain and continue as heretofore.

SEC. 3. The jurisdiction of the district court of the twelfth judicial district, in the county of San Francisco, and throughout the state, shall be co-extensive with the jurisdiction of the district court of the fourth judicial district.

(*b*) STATUTES OF 1859, 3.

SEC. 1. The fifth, fourteenth and fifteenth judicial districts of this state are hereby divided, and the sixteenth and seventeenth judicial districts created. The counties of San Joaquin and Tuolumne shall remain and hereafter constitute the fifth judicial district, of which the present judge shall remain and be the judge. The county of

7th. The seventh judicial district shall be composed of the counties of Marin, Sonoma, Mendocino, Napa, Solano and Contra Costa;

8th. The eighth judicial district shall be composed of the counties of Humboldt, Klamath and Del Norte;

9th. The ninth judicial district shall be composed of the counties of Shasta, Siskiyou and Trinity;

10th. The tenth judicial district shall be composed of the counties of Yuba and Sutter;

11th. The eleventh judicial district shall be composed of the counties of El Dorado, Placer and Yolo;

12th. The twelfth judicial district shall be composed of that portion of the city and county of San Francisco which is not included within the limits of the fourth judicial district, as above described, and of the county of San Mateo; (*a*)

13th. The thirteenth judicial district shall be composed of the counties of Mariposa, Tulare, Fresno, Merced and Stanislaus;

14th. The fourteenth judicial district shall be composed of the counties of Sierra and Nevada; (*b*)

15th. The fifteenth judicial district shall be composed of the counties of Plumas, Butte, Colusi and Tehama.

13. There shall be a district judge for each of the judicial districts. The courts held by them shall be the district courts of this state.

14. [1860.*] The district judges shall be chosen by the qualified electors of their respective districts, at the general elections, and shall enter upon the duties of *their office* on the first of January subsequent to their election, *and shall hold office for the term of six years.*

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* Statutes of 1860, 000. (*a*) See note *a*, page 311. (*b*) See note *b*, page 311.

Nevada shall remain and hereafter constitute the fourteenth judicial district, of which the present judge shall be and remain the judge. The counties of Colusi, Tehama and Butte shall remain and hereafter constitute the fifteenth judicial district, of which the present district judge shall remain and be the judge. The counties of Calaveras and Amador shall constitute the sixteenth judicial district, and the counties of Sierra and Plumas shall constitute the seventeenth judicial district, for each of which districts judges shall be appointed and elected as hereinafter provided.

15. [1860.] In case of a vacancy in the office of the district judge, the governor shall fill the same by granting a commission, which shall continue until the election and qualification of a judge in his place. *At the first general election subsequent to the occurrence of the vacancy, a judge shall be elected who shall qualify and enter upon the duties of his office on the first day of January subsequent to his election, and shall hold his office for the term of six years.*

16. Each district judge hereafter elected or appointed, shall be commissioned by the governor, and before entering upon his duties, shall take the constitutional oath of office.

17. [1855, 1859.*] Each judge shall reside in his district, except that the judges of the fourth and twelfth judicial districts may reside in any part of the county of San Francisco, and no person shall be eligible to the office of district judge who shall not have been a citizen of the United States and a resident of this state for two years, and of the district, six months previous to his election. *But a residence in any part of the city and county of San Francisco shall be deemed a residence within the fourth or twelfth judicial districts, within the meaning of the last clause of this section.*

18. The jurisdiction of these courts shall be of two kinds:
1st. Original;
2d. Appellate.

1. Appellate jurisdiction held unconstitutional. *People* v. *Peralta*, 3 Cal. 379; *Caulfield* v. *Hudson*, 3 Cal. 389; *Hernandez* v. *Simon*, 3 Cal. 464; *Reed* v. *McCormick*, 4 Cal. 342; *Townsend* v. *Brooks*, 5 Cal. 52; *Reyes* v. *Sanford*, 5 Cal. 117.

19. Their original jurisdiction shall extend to all civil cases where the amount in dispute exceeds two hundred dollars, exclusive of interest, and to all criminal cases not otherwise provided for. In cases involving the title or possession of real property, and in all issues of fact joined in the probate court, their jurisdiction shall be unlimited.

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* Statutes of 1859, 22.

1. The district court may issue a writ of certiorari to a county judge. *Chard* v. *Harrison*, 7 Cal. 113.

2. The district court has no jurisdiction in an action on an undertaking given for costs in the district court, where the costs are less than two hundred dollars. *Page* v. *Ellis*, 9 Cal. 248.

20. In all the counties of this state, the district courts shall have jurisdiction to try and determine all indictments transmitted to them from the court of sessions, in the cases provided for by law.

21. [1854.*] The appellate jurisdiction of these courts shall extend to a hearing upon appeal:

1st. A judgment of a court of sessions in a criminal action;

2d. A judgment of a court of sessions, rendered on appeal from justices', mayors', or recorders' courts, in a criminal action;

3d. An order or judgment of a probate court, in the cases prescribed by statute.

1. The appellate jurisdiction of the district courts held unconstitutional. See authorities cited under section 18, ante.

22. These courts, and the judges thereof, shall have power to issue all writs necessary or proper to the complete exercise of the power conferred upon them by the constitution, and by this and other statutes.

23. The terms shall be held at the county seats of the several counties; if a room for holding the court be not provided by the county, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff to provide such room, attendants, fuel, lights and stationery, and the expenses thereof shall be a county charge.

For terms in the district courts, see table, p. 7.

24. The terms shall be held until the business of the term is fully disposed of, or until the day fixed for the commencement of some other term in the district, and may be adjourned from time to time, in the discretion of the court.

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* Statutes of 1854, 28.

25. [1858.*] The district judges shall at all reasonable times, when not engaged in holding courts, transact such business at their chambers as may be done out of court, at chambers; they may try and determine writs of mandamus, certiorari and quo warranto, hear and dispose of all motions and applications for new trials, and all orders and writs which are usually granted in the first instance upon an ex parte application, and may in their discretion, also hear applications to discharge such orders and writs.

26. [1854.†] Whenever an action or proceeding is commenced in a district court, in which a county court has concurrent jurisdiction, the district court may, if the parties consent, by order, transfer the same to the county court of the same county; upon such transference, the county court shall have and exercise over such action or proceeding, the same jurisdiction as if originally commenced therein.

27. A district judge may hold a term in any judicial district in this state upon the request of the judge of the district in which such term is to be held; and when, by reason of sickness or absence from the state, or from any other cause, a term cannot be held in a district by the judge thereof, a certificate of that fact shall be transmitted by the clerk to the governor, who shall thereupon direct some other district judge to hold such term. It shall be the duty of the judge thus directed to hold such term.

28. Each district court shall have power to make rules, not inconsistent with the constitution and laws of this state, for its own government and the government of its officers, but such rules shall not be in force until thirty days after their adoption and publication, and no rule shall be made imposing any tax or charge upon any legal proceeding, or making an allowance to any officer for services.

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* Statutes of 1858, 83.

† Statutes of 1854, 28.

CHAPTER IV.

Sections twenty-nine to thirty-nine, inclusive, organizing the superior court of the city of San Francisco, repealed. *Statutes of* 1857, 128.

CHAPTER V.

THE COUNTY COURTS.

40. There shall be in each of the counties of this state a county court, with the jurisdiction conferred by this chapter.

41. The county judge of each county shall be the judge of the county court (*a*). The county judge of each county shall, except in the cases otherwise provided by special statutes, be chosen by the electors of the county, at the general election in the year one thousand eight hundred and fifty-three, and every four years thereafter, and shall enter upon the duties of his office on the first Monday of April subsequent to his election. Before entering upon his duties he shall take the constitutional oath of office.

42. In case of a vacancy in the office of county judge, the vacancy shall be filled by appointment from the governor until the next general election, when a county judge shall be chosen for the unexpired term of the preceding judge, and until the new judge elected be qualified.

43. The county court shall have jurisdiction to hear and determine all civil causes appealed thereto from a justice's, mayor's, or recorder's court, in the county.

(*a*) It is the duty of county judges to reside at the county seats of their respective counties, except in the following: Alameda, Contra Costa, Plumas, San Diego, San Luis Obispo, San Mateo, Santa Cruz, Sutter, Tehama, Tulare, Yolo and Yuba. *Statutes of* 1855, 2, 223, 288; 1857, 202, 222.

1. The authority to try these cases anew is the exercise of appellate, and not of original jurisdiction. *Townsend* v. *Brooks*, 5 Cal. 52.

2. Appeals taken from a justice's court to the county court upon questions of law alone, when reversed by the county court, shall be tried anew in the county court, and not be remitted to the justice. *People* v. *Freelon*, 8 ib. 517.

44. The county court shall have original civil jurisdiction:

1st. Of an action to enforce the lien of mechanics and others;

2d. Of an action to prevent or abate a nuisance;

3d. Of all proceedings against ships, vessels or boats, or against the owners or masters thereof, when the suit or proceeding is for the recovery of seamen's wages, for a voyage performed in whole or in part without the waters of this state;

4th. Of proceedings in cases of insolvency.

1. The granting of a ferry license, by a county judge, is an excess of jurisdiction, which can be properly reviewed on certiorari. *Chard* v. *Harrison*, 7 Cal. 113.

2. The county court has jurisdiction of cases of contested elections in the county, and grant or refuse a new trial when the question is determined. *Dickinson* v. *Van Horn*, 9 ib. 207; *People* v. *Haynes*, Cal. April T. 1859.

3. 1st. The county court has no jurisdiction to enforce a mechanic's lien, where the amount in controversy exceeds two hundred dollars. *Brock* v. *Herrick*, 5 ib. 279.

4. 4th. This provision sustained. *Harper* v. *Freelon*, 6 ib. 76.

45. The county court and the judge thereof shall have power, at chambers, to try and determine writs of mandamus, certiorari and quo warranto, and to issue all writs necessary or proper to the complete exercise of the powers conferred upon it by this and other statutes.

1. This jurisdiction is not opposed to the spirit or letter of our constitution. *People* v. *Day*, Cal. Jan. T. 1860.

46. This court shall hold a term on the first Monday of January, March, May, July, September and November of each year, which shall continue until all the business of the court be disposed of.

Special acts have frequently been passed creating different terms in many counties. See table, page 7.

47. If a room for holding the court be not provided by the county, together with attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, the court may direct the sheriff to procure such room, attendants, fuel, lights and stationery, and the expenses thereof shall be a county charge.

CHAPTER VI.

THE COURTS OF SESSIONS.

48. There shall be in each of the counties of this state, a court denominated a court of sessions, with the jurisdiction conferred by this chapter.

49. The court of sessions of each county shall be composed of the county judge, who shall be the presiding judge thereof, and two justices of the peace of the county, as associate justices.

1. The courts can exercise none but judicial powers, and all other powers conferred are unconstitutional. *Burgoyne* v. *Supervisors of San Francisco county*, 5 Cal. 9; *Phelan* v. *County of San Francisco*, 6 ib. 531; *Hardenburgh* v. *Kidd*, 10 ib. 402.

50. The associate justices of the court of sessions shall be chosen by the justices of the peace of the county. The county judge shall convene, at the county seat, on the first Monday of the month subsequent to the general election in each year, the persons elected as justices of the peace of the county at said preceding general election; and they, after being qualified and filing their respective bonds as such justices, as required by law, shall elect, by ballot, two of their number as associate justices of the court of sessions. The county judge shall preside over the convention, and the county clerk shall be its clerk. A majority of the persons who have qualified and filed their bonds as justices of the peace of the county, shall form a quorum for the purpose of the election. A minute of the proceedings of the convention shall be entered in the records of the courts of sessions. A certificate of election shall be given by the county judge and clerk, under the seal of the court of sessions, to the two persons who receive a majority of all the votes cast. Should there be no election for associate justices held at the time above prescribed, the county judge shall at any time be authorized to call an election for such purpose, by giving ten days' notice thereof.

1. The presence of the county judge and clerk of the convention is not essential, and if they refuse to attend, the election by the justices will still be valid. *Gorham* v. *Campbell*, 2 Cal. 135.

2. The court of sessions cannot be holden by the county judge and one associate justice; there must be the county judge and two associate justices to constitute the court. *People* v. *Ah Chung*, 5 ib. 103; *People* v. *Barbour*, 9 ib. 230.

51. If the justices of the court of sessions, or either of them, be absent at a term of a court of sessions, or the office of those justices, or either of them, be vacant, the county judge shall supply the vacancy or deficiency for the term, by designating the requisite number to form the court from the justices of the peace of the county.

52. [1854, 1860.*] The courts of sessions shall have jurisdiction:

1st. To inquire, by the intervention of a grand jury, of all public offenses committed or triable in *their respective counties;*

2d. To try and determine all indictments found therein, for all public offenses, except murder, manslaughter, *fighting a duel and killing or wounding any person therein*, and arson;

3d. To hear and determine appeals from justices', mayors' and recorders' courts, in cases of a criminal nature.

1. 3d. This appellate power declared unconstitutional. *People* v. *Fowler*, 9 Cal. 85.

53. [1854, 1860.*] When an indictment is found in the court of sessions for murder, manslaughter, *fighting a duel and killing or wounding any person therein*, or arson, it shall be transmitted by the clerk to the district court sitting in the county for trial; except when the indictment is found against a person holding the office of district judge, when it shall be transmitted to the district court of such other district as the court of sessions may direct.

54. [1854.†] Indictments found in the court of sessions shall be transmitted to the district court sitting in the county, for trial in the following cases:

1st. Whenever a judge or justice of the court of sessions is by law disqualified from hearing or trying the same;

2d. Indictments found against a member of the court of sessions, or any justice of the peace of the county.

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* Statutes of 1860, 000.

† Statutes of 1854, 28.

55. The court of sessions, except in the counties in which a board of supervisors is established, shall also have power and jurisdiction in its county:

1st. To make orders respecting the property of the county, in conformity with any law of this state, and to take care of and preserve such property;

2d. To examine, settle and allow all accounts legally chargeable against the county, and to direct the levying such per centage on the assessed value of real and personal property in the county as may be authorized by law;

3d. To examine and audit the accounts of all officers having the care, management, collection and disbursement of any money belonging to the county or appropriated by law, or otherwise, for its use and benefit;

4th. To control and manage public roads, turnpikes, ferries, canals and bridges within the county, where the law does not prohibit such jurisdiction, and to make such orders as may be necessary and requisite to carry its control and management into effect;

5th. To divide the county into townships, and to create new townships, and to change the divisions of the same, as the convenience of the county may require;

6th. To establish and change election precincts;

7th. To control and manage the property, real and personal, belonging to the county, and to receive by donation any property for the use and benefit of the county;

8th. To purchase any real and personal property necessary for the use of the county; provided, the value of such real property be previously estimated by three disinterested persons, to be appointed for that purpose by the district court of the county;

9th. To sell and cause to be conveyed any property belonging to the county, appropriating the proceeds of such sale to the use of the same;

10th. To cause to be erected and furnished a court-house, jail and such other public buildings as may be necessary, and the same to be kept in repair; provided, that the erection of such court-house, jail and other public buildings be let out, after one month's previous publication, in each case, of a readiness to receive proposals therefor, to

the lowest bidder, who will give good and sufficient security for the completion of any contract which may be made respecting the same;

11th. To ascertain and determine with a jury, or by consent of parties, without a jury, the just compensation to be made to the owners of private property taken for public use;

12th. To do and perform all such other acts and things as may be requisite and necessary to the full discharge of the powers and jurisdiction conferred on the court.

1. All powers which are not judicial are unconstitutional, when conferred upon the court of sessions. *Burgoyne* v. *Board of Supervisors of San Francisco county*, 5 Cal. 9; *Phelan* v. *County of San Francisco*, 6 ib. 531; *Hardenburgh* v. *Kidd*, 10 ib. 402.

2. The powers conferred on the courts of sessions have been subsequently conferred on the board of supervisors in each county. *Statutes of* 1855, 51.

56. When any bay, river, stream, creek or slough separates two counties, the court of sessions of the county lying on the left bank descending such bay, river, stream, creek or slough, shall have the jurisdiction of the same, so far as the control and management of bridges and ferries are concerned, but all sums paid for licenses to construct any bridges, or to run any ferries over such river, stream, creek, or slough, shall be divided equally between the two counties.

57. All accounts, vouchers, papers, petitions and documents relating to the business or property of the county, shall be appropriately arranged under their several heads, filed in the office of the county clerk, and preserved separate from the papers and documents of the court, as a court having criminal jurisdiction.

58. The orders, judgments and proceedings of the court, when sitting for the transaction of county business, shall be entered by the clerk in separate books to be kept for that purpose.

59. [1854, 1855.*] A term of the court of sessions shall be held at the county seat in each county on the first Monday of February, April, June, August, October and December of each year, excepting the county of Calaveras, where the terms of said court shall be held

* Statutes of 1855, 302.

on the second Monday of January, March, May, July, September and November, and excepting also the county of Placer, where the terms of said court shall be held on the second Monday of February, May, August and November in each year, and shall continue until the commencement of the next term, unless all the business of the court be sooner disposed of. Special terms of the court may also be held whenever, in the opinion of the county judge, the public interests require the same.

1. Special acts have frequently been passed creating different terms in several counties. See table, p. 7.

60. Until a court-house be erected for the county, this court may direct the sheriff to furnish a suitable room for holding the court, and the expenses thereof shall be a county charge. This court may, also, at any time, direct the sheriff to furnish attendants, fuel, lights and stationery, suitable and sufficient for the transaction of business, and the expenses thereof shall be a county charge.

CHAPTER VII.

THE PROBATE COURT.

61. There shall be in each county a probate court, with the jurisdiction conferred by this chapter.

62. The county judge of each county shall be the judge of the probate court.

63. The probate court shall have power to open and receive the proof of last wills and testaments, and to admit them to probate; to grant letters testamentary, of administration and of guardianship, and to revoke the same, for cause shown according to law; to compel executors, administrators and guardians to render an account when required, or at the period fixed by law; to order the sale of property of estates or belonging to minors; to order the payment of debts due by estates; to order and regulate all partitions of property or estate of deceased

persons; to compel the attendance of witnesses; to appoint appraisers or arbitrators; to compel the production of title deeds, papers or other property of an estate or of a minor; and to make such other orders, as may be necessary and proper, in the exercise of the jurisdiction conferred upon the probate court.

64. The county judge shall have power in vacation to appoint appraisers, to receive inventories and accounts to be filed in his court; to suspend the powers of executors, administrators, or guardians in the cases allowed by law; to grant special letters of administration or guardianship; to approve claims and bonds, and to direct the issuance, from this court, of all writs and process necessary in the exercise of his powers as probate judge.

65. The county judge of the county of San Francisco shall hold a probate court at the city of San Francisco, on the third Monday of January, March, May, July, September and November; provided, that each term of said court shall continue until the commencement of the next term, unless all the business of the court be sooner disposed of. In the other counties of the state, the county judge shall hold a probate court on the fourth Monday of each month.

1. Special acts have frequently been passed creating different terms in several counties. See table, p. 7.

CHAPTER VIII.

JUSTICES' COURTS.

66. The courts held by justices of the peace in this state shall be denominated justices' courts, and shall have the jurisdiction conferred by this chapter, but nothing contained in this chapter shall affect their jurisdiction in actions or proceedings now pending therein, nor shall it affect any judgment or order already made, or proceedings already taken.

67. [1856.*] Justices' courts shall have jurisdiction of the following actions and proceedings:

1st. Of an action arising on contracts for the recovery of money only, if the sum claimed, exclusive of interest, does not exceed two hundred dollars;

2d. Of an action for damages for injury to the person, or for taking or detaining personal property, or for injuring real or personal property, if the damages claimed do not exceed two hundred dollars;

3d. Of an action for a fine, penalty or forfeiture, not exceeding two hundred dollars, given by statute or the ordinance of an incorporated city;

4th. Of an action upon a bond conditioned for the payment of money not exceeding two hundred dollars, though the penalty exceed that sum, the judgment to be given for the sum actually due; when the payments are to be made by instalments, an action may be brought for each instalment as it becomes due;

5th. Of an action upon a surety, bond or undertaking taken by them, though the penalty exceed, if the amount claimed does not exceed two hundred dollars;

6th. Of an action for the foreclosure of any mortgage, or the enforcement of any lien on real or personal property, when the debt secured does not exceed, exclusive of interest, two hundred dollars;

7th. Of an action to recover the possession of personal property when the value of such property does not exceed two hundred dollars;

8th. To take and enter judgment on the confession of a defendant when the amount confessed does not exceed two hundred dollars;

9th. Of an action for a forcible or unlawful entry upon, or a forcible or unlawful detention of, lands, tenements or other possession;

10th. Of an action to determine the right to a mining claim, and for damages for injury to the same, when the damages claimed do not exceed two hundred dollars;

11th. Of proceedings respecting vagrants and disorderly persons.

1. The jurisdiction of justices of the peace is limited by the constitution to cases in which the value of the thing in controversy does not exceed the sum of two hundred dollars, except in proceedings under the statute concerning forcible entry and unlawful

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* Statutes of 1856, 133.

detainer. *Zander* v. *Coe*, 5 Cal. 230; *Van Etten* v. *Jilson*, 6 ib. 19; *Hart* v. *Moon*, ib. 161; *Freeman* v. *Powers*, 7 ib. 104.

68. [1856.*] The jurisdiction conferred by the last section shall not extend, however:

1st. To a civil action in which the title to real property shall come in question;

2d. Nor to an action or proceeding against ships, vessels or boats, or against the owners or masters thereof, when the suit or proceeding is for the recovery of seamen's wages for a voyage performed in whole or in part without the waters of this state.

69. [1855.†] These courts shall also have jurisdiction, except within the limits of the city of San Francisco, of the following public offenses committed within the respective counties in which such courts are established:

1st. Petit larceny;

2d. Assault and battery, not charged to have been committed upon a public officer in the discharge of his duties, or with intent to kill;

3d. Breaches of the peace, riots, affrays, committing a willful injury to property; and all misdemeanors, punishable by fine, not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.

1. The act conferring criminal jurisdiction on justices' courts is constitutional. *People* v. *Fowler*, 9 Cal. 85.

70. There shall be no terms in justices' courts; these courts shall always be open.

71. Justices of the peace shall hold their offices for one year, (*a*) and until their successors are elected and qualified. They shall be chosen by the electors of their respective townships or cities at the general election in the year one thousand eight hundred and fifty-

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* Statutes of 1856, 133. † Statutes of 1855, 302.

(*a*) STATUTES OF 1855, 147, §6.

Justices of the peace in San Francisco city and county hold office for two years.

three, and at the general election every year thereafter, and shall enter upon their duties on the first Monday of the month subsequent to their election. Whenever a vacancy shall occur in the office of a justice, by death, resignation or otherwise, a special election may be ordered by the county judge to supply such vacancy. The justice elected to supply a vacancy shall hold his office only for the unexpired term of his immediate predecessor. Each justice, before entering upon the discharge of his duties, shall take the constitutional oath of office, and shall execute a bond to the state in the sum of five thousand dollars, conditioned for the faithful performance of his duties, and file the same with the county clerk.

CHAPTER IX.

RECORDERS' COURTS.

72. The recorders' courts which are already established, or which may hereafter be established, in any incorporated city of this state, shall have jurisdiction:

1st. Of an action or proceeding for the violation of any ordinance of their respective cities;

2d. Of an action or proceeding to prevent or abate a nuisance within the limit of their respective cities;

3d. Of proceedings respecting vagrants and disorderly persons.

73. The recorders' courts already established, or which may hereafter be established, shall also have jurisdiction of the following public offenses committed in their respective cities:

1st. Petit larceny;

2d. Assault and battery, not charged to have been committed upon a public officer, in the execution of his duties, or with intent to kill;

3d. Breaches of the peace, riots, affrays, committing willful injury to property, and all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding three months, or by both such fine and imprisonment.

74. A recorder's court shall be held by a judge, who shall be designated as the "recorder of the city;" and said court shall be held at such place in the city within which it is established, as the government of such city may by ordinance direct.

75. The recorders shall be chosen by the electors of their respective cities, on a day to be fixed by the government of such cities, and shall hold their offices for one year, unless a longer period be fixed in the acts incorporating such cities, in which case, for such period fixed. Before entering upon their duties, they shall take the constitutional oath of office.

76. The recorders shall receive a compensation to be fixed by the charter, or when not so fixed, by the government of their respective cities, to be paid by such cities quarterly, in equal proportions. Such compensations shall not be increased or diminished during the period for which they are elected.

77. The recorders shall possess the powers and exercise the duties of committing magistrates, in the criminal cases in which the courts held by them have no jurisdiction by this act; and as such magistrates, they may examine, commit or discharge, all persons brought before them, as the justice of the case may require.

78. Recorders and recorders' courts may issue all process, writs and warrants, and may make any and all orders necessary and proper to the complete exercise of their powers.

79. There shall be no terms in recorders' courts. These courts shall always be open.

CHAPTER X.

MAYORS' COURTS.

80. The mayors' courts which are already established, or which may hereafter be established in any incorporated city of this state, shall have the same jurisdiction of actions and of public offenses committed in their respective cities, which is conferred by this act upon recorders' courts.

81. The mayors of incorporated cities, when authorized by law to hold a court in their respective cities, shall possess the same powers as committing magistrates, as are conferred by this act upon recorders of cities.

82. The mayors' courts, and the mayors or the judges of such courts, may issue all process, writs and warrants, and may make any and all orders necessary and proper to the complete exercise of their powers.

CHAPTER XI.

GENERAL PROVISIONS RESPECTING THE COURTS OF JUSTICE AND JUDICIAL OFFICERS.

ARTICLE I.

COURTS OF RECORD: PUBLICITY OF THE PROCEEDINGS OF THE COURTS AND THEIR INCIDENTAL POWERS.

83. The supreme court, the several district courts, the several county courts, the several courts of sessions, and the several probate courts of this state, shall be courts of record.

84. The sittings of every court of justice shall be public, except as is provided in the next section.

85. In an action for divorce, the court may direct the trial of any issue of fact joined therein to be private; and upon such directions, all persons may be excluded except the officers of the court, the parties, their witnesses and counsel.

86. Every court shall have power:

1st. To preserve and enforce order in its immediate presence;

2d. To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority;

3d. To compel obedience to its lawful judgments, orders and process, and to the lawful orders of its judge out of court, in an action or proceeding pending therein;

4th. To control in furtherance of justice the conduct of its ministerial officers.

ARTICLE II.

PARTICULAR DISQUALIFICATION OF JUDGES.

87. A judge shall not act as such in any of the following cases:

1st. In an action or proceeding to which he is a party, or in which he is interested;

2d. When he is related to either party by consanguinity or affinity, within the third degree;

3d. When he has been attorney or counsel for either party in the action or proceeding; but this section shall not apply to the arrangement of the calendar or the regulation of the order of business.

1. Where the plaintiff discovers that the justice and defendant are related, and on that ground withdraws the suit, the justice cannot render judgment for his costs. *Randall* v. *Hall*, Lalor's Supp. 239.

2. A confession of judgment before a justice, who is a father-in-law to the plaintiff, is illegal on the ground of relationship. *Chapin* v. *Churchill*, 12 How. Pr. 367.

88. A judge shall not act as attorney or counsel in a court in which he is judge, or in an action or proceeding removed therefrom to

another court for review, or in any action or proceeding from which an appeal may lie to his own court.

89. A judge of the supreme court, or of the district court, shall not act as attorney or counsel in any court, except in an action or proceeding to which he is a party on the record.

90. A judge or justice of the peace shall not have a partner acting as attorney or counsel in any court in this state.

91. A judge of the supreme court, or of the district court, or of a county court, shall not absent himself from the state.

ARTICLE III.

JUDICIAL DAYS AND PLACES OF HOLDING COURTS.

92. The courts of justice may be held and judicial business may be transacted on any day except as provided in the next section.

93. No court shall be opened nor shall any judicial business be transacted on Sunday, on New Year's Day, on the Fourth of July, on Christmas Day, on Thanksgiving Day, or on a day in which the general election is held, except for the following purposes:

1st. To give, upon their request, instructions to a jury then deliberating on their verdict;

2d. To receive a verdict, or discharge a jury;

3d. For the exercise of the powers of a magistrate in a criminal action, or in a proceeding of a criminal nature.

94. Every court of justice except a justice's, mayor's, or recorder's court, shall sit at the county seat of the county in which it is held, except in the cases provided in this article. Justices' courts shall be held in their respective townships or cities, and mayors' and recorders' courts in their respective cities; provided, justices of the peace for townships of the county of San Francisco, within the corporate limits

of the city of San Francisco, shall have jurisdiction within said corporate limits, of all actions and proceedings of which justices of the peace of said county have or may have by law jurisdiction, whenever the parties to the said actions or proceedings may reside in said city; and, provided, that no justice of the peace shall hold a court in any other township of said county or city than the one for which he shall have been elected.

95. If no judge attend on the day appointed for the holding the court, before noon, the sheriff or clerk shall adjourn the court until the next day at ten o'clock, and if no judge attend on that day before noon, the sheriff or clerk shall adjourn the court until the following day; and so on from day to day, for one week. If no judge attend for one week, the sheriff or clerk shall adjourn the court for the term.

96. A judge authorized to hold or preside at a court appointed to be held in a city or town, may, by an order filed with the county clerk, and published as he may prescribe, direct that the court be held or continued at any other place in the city or county than that appointed, when war, pestilence, or other public calamity, or the dangers thereof, or the destruction of the building appointed for holding the court, may render it necessary; and may in the same manner revoke the order, and in his discretion appoint another place in the same city or county for holding the court.

97. When the court is held at a place appointed as provided in the last section, every person held to appear at the court, shall appear at the place so appointed.

ARTICLE IV.

SEALS OF THE COURTS OF JUSTICE.

98. [1860.*] Each of the following courts, and no other, shall have a seal: 1. The supreme court. 2. The district courts. 3.

* Statutes of 1860, 000.

The county courts. 4. The courts of sessions. 5. The probate courts. 6. *The police judge's court of the city and county of San Francisco.*

99. The seal now used by the supreme court, shall be the seal of the said court; and where seals have been provided for the county courts, courts of sessions, and probate courts, such seals shall continue to be used as the seals of said courts.

100. [1860.*] The several district courts, and also the county courts, courts of sessions, probate courts, *police judge's court of the city and county of San Francisco*, for which separate seals have not been heretofore provided, shall direct their respective clerks to procure seals, which shall be devised by the respective judges of such courts, and shall have the following inscriptions surrounding the same:

1st. For the district courts: "district court, ——— county, California," inserting the name of the county;

2d. For the county courts: "county court, ——— county, California," inserting the name of the county;

3d. For the courts of sessions: "court of sessions, ——— county, California," inserting the name of the county;

4th. For the probate courts: "probate court, ——— county, California," inserting the name of the county;

5th. *For the police judge's court of the city and county of San Francisco: "police judge's court of the city and county of San Francisco."*

101. Until the seals devised, as provided in the last section, are procured, the clerk of each court may use his private seal, whenever a seal is required.

102. The clerk of each court shall keep the seal thereof.

103. The seal of the court need not be affixed to any proceedings therein, except:

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* Statutes of 1860, 000.

1st. To a summons or writ;

2d. To the proof of a will, or the appointment of an executor, administrator or guardian;

3d. To the authentication of a copy of a record, or other proceeding of the court, or an officer thereof, for the purpose of evidence in another court.

104. The seal may be affixed by impressing it on the paper, or on a substance attached to the paper and capable of receiving the impression.

1. *Connolly* v. *Goodwin*, 5 Cal. 220.

ARTICLE V.

MISCELLANEOUS PROVISIONS RESPECTING COURTS AND JUDICIAL OFFICERS.

105. If an application for an order, made to a judge of a court in which the action or proceeding is pending, be refused, in whole or in part, or be granted conditionally, no subsequent application for the same order shall be made to any other judge, except of a higher court; provided, that nothing in this section be so construed as to apply to motions refused for any informality in the papers or proceedings necessary to obtain an order.

106. A violation of the last section may be punished as a contempt; and an order made contrary thereto may be revoked by the judge who make it, or vacated by a judge of a court in which the action or proceeding is pending.

107. The judges of the supreme court, of the district courts, and of the county courts, shall have power in any part of the state, and justices of the peace and recorders within their respective counties, and recorders and mayors, within their respective cities, shall have power to take and certify:

1st. The proof and acknowledgment of a conveyance of real property, or of any other written instrument;

2d. The acknowledgment of satisfaction of a judgment of any court;

3d. An affidavit to be used in any court of justice of this state.

108. No action or proceeding in a court of justice shall be affected by a vacancy in the office of all or any of the judges, or by the failure of a term thereof.

109. Every written proceeding in a court of justice in this state, or before a judicial officer, shall be in the English language; but such abbreviations as are now commonly used in that language may be used, and numbers may be expressed by figures or numerals, in the customary manner. In the counties of San Luis Obispo, Santa Barbara, Los Angeles and San Diego, the proceedings may be in the English or Spanish languages.

AN ACT

CONCERNING FORCIBLE ENTRIES AND UNLAWFUL DETAINERS.

PASSED APRIL 22, 1850.

The People of the State of California represented in Senate and Assembly, do enact as follows:

1. No person or persons shall hereafter make any entry into lands, tenements, or other possessions, but in cases where entry is given by law, and in such cases, not with strong hand nor with multitude of people, but only in a peaceable manner; and if any person from henceforth do to the contrary, and thereof be duly convicted, he shall be punished by fine.

1. When a party of four or five men enter a building occupied by another, in the night time, during the hours of sleep, and take possession, and avow their intention to keep possession, and actually do so, it is sufficient evidence of force to maintain this action. *Scarlett* v. *Lamarque*, 5 Cal. 63.

2. To maintain this action, actual force, threats of violence, or just apprehension of violence to person, must be shown to have existed, unless the detainer be riotous. *Frazier* v. *Hanlon*, ib. 156; *Willard* v. *Warren*, 17 Wend. 257.

3. Facts amounting to a mere trespass are not sufficient to maintain this action. *Frazier* v. *Hanlon*, 5 Cal. 156.

4. This act is in derogation of the common law, and must be strictly construed. *House* v. *Keiser*, 8 ib. 499.

5. An action of forcible entry and detainer will not lie against a party claiming a right to land, who is not in the actual possession. *Preston* v. *Kehoe*, 10 ib. 445.

2. Any justice of the peace shall have authority to inquire, as hereinafter directed, as well against those who make unlawful or forcible entry into lands, tenements, or other possessions, and detain the same, as against those who, having lawful and peaceful entry into lands, tenements, or other possessions, unlawfully detain the same; and if it be found, upon such inquiry, that an unlawful or forcible entry hath been made, and that the said lands, tenements, or other possessions, after a lawful entry, are held unlawfully, then such justice shall cause the party complaining to have restitution thereof.

1. The recorder of the city of Sacramento has no jurisdiction in these cases. *Crosse* v. *Carghill*, 4 Cal. 120.

2. In this action, the holding over the land is the foundation of the action, and must be proven. *Reed* v. *Grant*, ib. 176.

3. A description of the land sufficiently definite to enable the administration of substantial justice, is all that is required. *Hernandez* v. *Simon*, ib. 182.

4. This action is a summary proceeding provided by statute, and does not belong to the district courts, by virtue of their constitutional jurisdiction. *Ramirez* v. *Murray*, ib. 293; *Townsend* v. *Brooks*, 5 ib. 52.

5. A landlord cannot maintain this action in his own name for an unlawful entry upon the possession of his tenant. *Treat* v. *Stuart*, ib. 113.

6. This statute provides a remedy for unlawful as well as forcible entry, and its policy is doubtless to avoid nice distinctions as to what constitutes force. *Moore* v. *Goslin*, ib. 266.

7. The jurisdiction vested in justices' courts to try these cases is not unconstitutional. *O'Callaghan* v. *Booth*, 6 ib. 63; *Hart* v. *Moon*, ib. 161.

8. In an action for holding over after the expiration of the term, three days' notice is all that is required. *Garbrell* v. *Fitch*, ib. 189.

9. The jurisdiction of the justices in these cases arises from the *quasi* criminal nature thereof, and falls under the head of "special cases," as used in the constitution. *Small* v. *Gwinn*, ib. 447.

10. The action may be maintained in three cases: when the entry is forcible, or the entry unlawful and the detainer forcible, or the entry lawful and the detainer forcible; but in any case there must be something of personal violence, either threatened or actual. *Dickinson* v. *Maguire*, 9 ib. 46.

11. In an unlawful entry there must be some ingredient of fraud, or willful wrong, on the part of the party making the entry. Ib.

3. When any complaint shall be made in writing to any justice of the peace, of any such unlawful or forcible entry, or unlawful detainer, said justice shall issue a summons, directed to the sheriff or any constable of the county, commanding him to summon the person or per-

sons against whom such complaint shall have been made, to appear before the said justice on a day in such summons named, which shall not be less than ten days from the day of issuing the summons, and at the place therein mentioned.

1. A tenant in common cannot maintain an action of forcible entry and detainer against his co-tenant for holding over. The land must first be partitioned. *Lick* v. *O'Donnell*, 3 ib. 59.

2. The statute does not require an allegation of possession by the plaintiff; this objection is at most only subject to demurrer. *Cronise* v. *Carghill*, 4 ib. 120.

3. The rule that a penal statute must be declared upon by the party seeking recovery under it, does not apply to pleadings in justices' courts. *O'Callaghan* v. *Booth*, 6 ib. 63.

4. The complaint need not pray for treble damages to warrant the court in so adjudging. *Hart* v. *Moon*, ib. 161.

4. Such summons shall be served upon the person or persons against whom the same is issued, by delivering a certified copy thereof to such person or persons, at least two days before the return day thereof; and the officer serving the same shall make a special return of the time and manner of serving such summons.

5. After the return of the summons, served as hereinbefore provided, and at the time and place appointed in said summons, the justice shall proceed to hear and determine said complaint, unless either party shall demand a jury; in which case the justice shall issue a venire for a jury in the same manner and upon the same terms as in other cases provided for trial by jury in justices' courts, and such jury shall be sworn as in other cases.

6. If, at the time of making of such complaint, it shall be made to appear that the person or persons, against whom the said complaint is made, or either of them, are absent from the county, it shall be the duty of the justice before whom the same is made, to issue his summons, as hereinbefore provided, and the same may be served by leaving a certified copy thereof at the last and usual place of abode of such person or persons, not less than two days before the return day thereof, which copy shall be left with some member of the family, or some person residing at such place, of suitable age and discretion, to whom the contents thereof shall be explained by the officer leaving the same,

and the officer shall make a special return of the time and manner of serving said summons, and the suit shall thereafter proceed the same as though a personal service were had of such summons.

7. The justice may, at his discretion, adjourn any trial under this act, not exceeding ten days, and when the defendant, his agent, or attorney, shall make oath that he cannot safely proceed to trial, for want of some material witness, naming him, that he has made due exertion to obtain such witness, and believes, if an adjournment be allowed, he will be able to procure the attendance of such witness, or his deposition, in time to produce the same upon trial; in which case, if such person or persons will give bond, with one or more sufficient sureties, conditioned to pay the said complainant for all rent that may accrue during the pending of such suit, and all costs and damages consequent upon such adjournment, the said justice shall adjourn said cause for such reasonable time as may appear necessary, not exceeding three months.

8. The testimony of any witness, which may be considered necessary by either party, may be taken in the same manner, and with the like effect as is provided for the taking of testimony in other cases in justices' courts.

9. On the trial, the complainant shall only be required to show, in addition to the forcible entry or detainer complained of, that he was peaceably in actual possession at the time of the forcible entry, or was entitled to the possession of the premises at the time of a forcible holding over. The defendant may show in his defense that he, or his ancestors, or those whose interest in such premises he claims, have been in quiet possession thereof for the space of one whole year together next before the said inquisition, and that his interest therein is not then ended or determined, and such showing shall be a bar to the prosecution, and in no case when the title of land is necessarily involved shall a justice of the peace have cognizance.

1. The plaintiff in this action must show an actual peaceable possession in himself, at the time of the entry. *Treat* v. *Stuart*, 5 Cal. 113.

2. What is actual and what constructive possession, in many cases, must be a question of fact for the jury. *O'Callaghan* v. *Booth*, 6 ib. 63.

3. When the plaintiff in an action for a forcible entry, for the front of a town lot, proved that he had a small house on the rear of it: held, sufficient to warrant a jury in finding an actual possession of the whole lot. *O'Callaghan* v. *Booth*, 6 Cal. 63.

4. A mere survey and marking lines of a boundary, without an enclosure of the premises, is not a possession in law, unless made so by complying with the statute in reference to the mode of maintaining possessory actions on public land. *Bird* v. *Dennison*, 7 ib. 297.

5. The possesion must be actual, peaceable and exclusive, and not a mere scrambling or interrupted possession, or the exercise of casual acts of ownership over the premises. *House* v. *Keiser*, 8 ib. 499.

6. In an action for a forcible entry and detainer of a mine, against a corporation and C. and V., the jury returned a verdict of guilty as to C. and V., and not guilty as to the corporation: held, that such verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of entry. *Fremont* v. *Crippen*, 10 ib. 211.

10. If, upon the trial of any complaint under this act, the justice or jury shall find the defendant or defendants, or either of them, guilty of the allegations in the complaint, said justice shall thereupon enter judgment for the complainant to have restitution of the premises, and shall impose such fine, not exceeding one hundred dollars, considering all the circumstances, as he may deem just, and shall tax the costs for the complainant, and may issue execution therefor; and the said justice shall also award and issue a writ of restitution; but if the said justice or the jury find that the person complained of is not guilty, the justice shall tax the costs against the complainant, and issue execution therefor.

11. If the jury empanneled cannot agree upon a verdict, the justice may, with the consent of the parties, discharge them, and issue a venire returnable forthwith, or at some other time agreed upon by the parties.

12. In all cases of a verdict by the justice or jury for the complainant, the damages shall be assessed as well for waste and injury committed upon the premises, as for the rents and profits during such detainer; and the verdict shall also find the monthly value of the rents and profits of the said premises; and the complainant shall be entitled to recover treble damages against the persons against whom judgment has been rendered, which damages shall be assessed by the justice or jury, and when so assessed shall be trebled by said justice,

and entered as a judgment in the cause, upon which execution may issue.

1. A, in pursuance of the provisions of the "act prescribing the mode of maintaining and defending possessory actions on lands belonging to the United States," entered upon unoccupied land, and marked it out, so that its boundaries might be easily traced, and commenced to build a house upon it, when he was ousted by B; held, in an action of forcible entry, A could recover the land from B, but without a fine or treble damages. *Stark* v. *Barnes*, 4 Cal. 412.

13. When any person shall hold over any lands, tenements, or other possessions, after the termination of the time for which they are demised, or let to him or her, or to the person under whom he or she holds possession, or contrary to the conditions or covenants of the lease or agreement under which he or she holds, or after any rent shall become due according to the terms of such lease or agreement, and shall remain unpaid for the space of three days, in all such cases, if the lessor, his heirs, executors, administrators, assigns, agent or attorney, shall make demand in writing of such tenant, that he or she shall deliver possession of the premises held as aforesaid, and if such tenant shall refuse or neglect, for the space of three days after such demand, to quit the possession of such lands or tenements, or to pay the rent thereof, due and unpaid as aforesaid, upon complaint therefor to any justice of the peace of the proper county, the justice shall proceed to hear, try, and determine the same, in the same manner as in other cases hereinbefore provided for, but shall impose no fine upon any such case mentioned in this section.

1. By the terms of an award, which was decisive between a landlord and his tenant, the tenant was to quit the premises on the 9th; held, the landlord had no right to give notice before the 10th. The tenant had then six days to remove, wherefore an action commenced on the 10th was premature. *Ray* v. *Armstrong*, 4 Cal. 208.

14. The preceding section shall not extend to any person who has, or shall have continued in possession one year after the termination of the time for which the premises were demised, or leased, or let to him or her, or those under whom he or she holds possession, or to any person who continues in possession three years, quietly and peaceably.

15. Every person summoned as a juror, or subpœnaed as a witness, who shall not appear, or who, appearing, shall refuse to serve or give

evidence in any prosecution instituted under this act, shall forfeit and pay for every such default or refusal, to the use of the county, unless some reasonable cause be assigned, such fine, not exceeding twenty dollars, as the said justice shall think proper to impose, and execution may issue therefor.

16. [1858.*] If either party shall feel aggrieved by the verdict of the jury or decision of the justice, he may appeal within ten days, as in other cases tried before justices of the peace, and he shall give bond with two or more sufficient sureties, to be approved by said justice, conditioned to pay all costs of such appeal, and abide the order the court may make therein, and pay all rent and other damages justly accruing during the pendency of such appeal; *and upon the filing of the notice of appeal, and the affidavit of the appellant that the appeal is taken in good faith, and that he intends to perfect said appeal, the justice shall grant a stay of the writ of restitution, for not exceeding two days, for the purpose of allowing the appellant an opportunity to file his appeal bond, and for no other.*

1. The provision requiring justices' fees to be paid before the papers on appeal are sent up, will also apply in these cases. The action must be governed by the provisions of this act, so far as they go, and as to matters not embraced by the words of the act, the general rules governing proceedings in justices' courts will apply. *People* v. *Harris*, 9 Cal. 571.

17. [1852.†] Upon taking such appeal, all further proceedings in the case shall be thereby stayed, and the appellate court, in all cases which are now pending or which may be hereafter brought, shall proceed to try the case anew, and shall issue all necessary writs and process to carry out the provisions of this act. All laws or parts of laws which require a statement of the case or evidence, or exceptions to be taken before a justice of the peace, on the trial of a case for forcible entry and unlawful detainer, in order to perfect an appeal, are hereby repealed, and the same shall be tried in the appellate court, on the evidence introduced before said appellate court.

1. The authority of the court to try these cases anew, on appeal, is the exercise of appellate and not original jurisdiction. *Townsend* v. *Brooks*, 5 Cal. 52.

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* Statutes of 1858, 90.

† Statutes of 1852, 156.

2. The power of the county court to treble the damages by way of penalty in actions of forcible entry, results by necessary implication from its power to try the case anew. *O'Callaghan* v. *Booth*, 6 Cal. 63.

18. If a writ of restitution shall have been issued previous to the taking of the appeal, the justice shall give the appellant a certificate of the allowance of such appeal, and upon the serving of such certificate upon the officer having such writ of restitution, said officer shall cease all further proceedings by virtue of such writ, and if such writ shall not have been completely executed, the parties in possession shall remain in possession of the premises until the appeal shall be determined.

1. If the sheriff refuses to execute the writ on the ground that the premises are in possession of certain persons not parties to the suit, the court will award a peremptory mandamus against the sheriff to compel him to execute the writ. *Fremont* v. *Crippen*, 10 Cal. 211.

19. In all cases of appeal under this act, the appellate court shall not dismiss or quash the proceedings for want of form, only provided the proceedings have been conducted substantially according to the provisions of this act.

20. Amendments to the complaint, answer, or summons, or matters of form only, may be allowed by the court at any time before final judgment, upon such terms as may be just, and all matters of excuse, justification, or avoidance of the allegations in the complaint, may be given in evidence under the answer.

21. The following, or equivalent forms, may be used in proceedings under this act to wit:

SUMMONS.

The people of the state of California

To the sheriff or any constable of the county aforesaid:

Whereas, A. B., of the county of ——— hath exhibited to me, a justice of the peace for said county, a complaint against C. D., of the county of ——— for that the said C. D., of the county of ——— on the —— day of —— A. D. —— at the county of ——— (here insert the substance of the complaint with sufficient certainty). You

are therefore commanded to summon the said C. D., if he be found in your county, to be and appear before me at my office, (or stating the place) on the ——— day of ——— A. D., ———, then and there to make answer unto the complaint aforesaid.

Given under my hand and seal, this ——— day of ——— A. D., ———. E. F., Justice of the Peace.

WRIT OF RESTITUTION.

The people of the state of California

To the sheriff, or any constable of the county aforesaid:

Whereas, A. B., of the county of ——— at a court of inquiry of an unlawful or forcible entry, or unlawful detainer, (as the case may be) held at my office (or state the place) in the county aforesaid, on the ——— day of ——— A. D., ———, before me, a justice of the peace for the county aforesaid, by the consideration of the court, hath recovered judgment against C. D., to have restitution of (here describe the premises, as in the complaint). You are therefore commanded that, taking with you the force of the county, if necessary, you cause the said C. D. to be immediately removed from the aforesaid premises, and the said A. B. to have peaceable restitution of the same; and you are also commanded that, of the goods and chattels of the said C. D., within said county, you cause to be made the sum of ——— dollars, for the said plaintiff, together with the costs of suit endorsed hereon, and make return hereof within thirty days from this date.

Given under my hand, this ——— day of ——— A. D., ———. E. F., Justice of the Peace.

1. This writ does not determine either the right to the property or the right of possession, and constitutes no defense to an action of ejectment. *Mitchell* v. *Hagood*, 6 Cal. 148.

Stats 1861 p 583
Application for act May changing time of monthly courts

RULES OF THE SUPREME COURT

OF CALIFORNIA.

I. Applicants for license to practice as attorneys and counselors of this court may be examined in open court on the first week of each term.

II. In all cases where an appeal is perfected and the statement settled, (if there be one) twenty days before the commencement of the next succeeding term of this court, the transcript of the record shall be filed on or before the first day of such term.

III. If the transcript of the record is not filed within the time prescribed, the appeal may be dismissed, on motion, during the first week of the term, without notice, upon satisfactory evidence of the omission. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored, the dismissal shall be final, and a bar to any other appeal in the same cause.

IV. Satisfactory evidence of the omission to file the transcript, shall be deemed to be the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment, the date of its rendition, the time when the appeal was perfected and statement settled, (if there be one) and also that the appellant has received the transcript, or that he has not directed a transcript of the record to

be made out, or if he has given such direction, that he has not tendered the fees therefor.

V. All transcripts of records hereafter sent to this court, shall be on paper of uniform size, according to a sample to be furnished by the clerk of the court, with a blank margin one and a half inches wide at the top, bottom and side of each page, and all pleadings, proceedings and evidence shall be chronologically arranged.

VI. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves.

VII. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order or proceeding, and of the testimony of each witness, and shall have at least one blank or flying cover.

VIII. Marginal notes of each separate paper, order or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

IX. The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured and every part conveniently read.

X. The transcript shall be written in a fair, legible hand, and each paper or order shall be separately stated.

XI. No record which fails to conform to these rules, shall be received or filed by the clerk of the court.

XII. For the purpose of correcting any error or defect in the transcript from the court below, either party may suggest the same in writing to this court, and upon good cause shown, obtain an order that the proper clerk certify to this court the whole or part of the record, as may be required. If the attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the sug-

gestion must be accompanied by an affidavit proving the existence of the error or defect alleged.

XIII. Exceptions to the transcript, statement, the appeal bond, notice of appeal, or to its service, or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed; and must be noted in writing and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the court before the argument on the merits.

XIV. Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the court, on the part of such representative or of any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

XV. The calendar of each term shall consist only of those causes in which the transcript shall have been filed five days before the commencement of the term, unless by the written consent of the parties; *provided*, that all cases, in which the appeal is perfected, and the statement settled, as provided in rule second, and the transcript is not filed five days before the first day of the term, may be placed on the calendar on motion of the respondent, upon the filing of the transcript.

XVI. All causes from the same judicial district shall be set together, and in the order of the number of the district, commencing with the first, except that the calendar shall end with the Sacramento causes, preceded by those from San Francisco, and except also that causes in which the people of the state are a party, shall be placed at the head of the calendar.

XVII. Before the argument, both the appellant and respondent shall furnish to each other and to each of the justices of the court, a copy of his points and authorities; or either party may file one copy

thereof with the clerk, who shall cause the copies to be made for the use of the court, and may tax the same in his bill of costs.

XVIII. A list of the authorities to be used in the argument of any cause shall, if applied for, be furnished to the counsel of the adverse party one day before the hearing.

XIX. No more than two counsel on a side will be heard upon the argument, except in peculiar and important cases, but each defendant who has appeared separately in the court below, may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument. Each counsel will be allowed one hour.

XX. All opinions delivered by the court shall, after the expiration of twenty days from the time they are delivered, be recorded by the clerk, who shall, after recording the same, deliver the originals, with a transcript of the judgment, order or decree of the court thereon, to the reporter.

XXI. The clerk shall allow the reporter to take with the opinions, the transcript and briefs in the cases; but not more than four transcripts shall be taken from his office at the same time, and for each transcript taken the clerk shall require a receipt from the reporter. The reporter may retain the transcripts, subject to the orders of the court, or of one of the judges, so long as it may be necessary to enable him to report properly the decisions of the court.

XXII. All motions for a rehearing shall be upon petition in writing, presented within ten days after any final judgment is rendered, or order made by the court, and no argument will be heard thereon. No remittitur to the court below shall be issued until the expiration of the ten days herein provided, unless upon some good cause shown, and upon notice to the other party, or by written consent of the parties, filed with the clerk.

XXIII. The petition for rehearing shall not operate as a stay of

proceedings without the order of the court, or in vacation, of two of the judges.

XXIV. On a rehearing, in cases hereafter arising, if the decree, judgment or order of the court, as to which a rehearing is granted, be not in the opinion of two of the judges erroneous, the same shall stand.

XXV. On a reversal of a judgment, a certified copy of the opinion in the case shall be transmitted to the court below.

XXVI. No paper shall be taken from the supreme court-room, or clerk's office, except by order of the court, or of one of the judges; and except as provided by the twenty-first rule.

XXVII. No writ of error, or of certiorari, shall be issued, except upon order of one of the judges, upon petition, showing a proper case for the issuance of the same.

XXVIII. When a writ of error is issued, upon filing the same, and a sufficient bond or undertaking with the clerk of the court below, and upon giving notice thereof in writing to the opposite party or his attorney, and to the sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

XXIX. The writ of error shall be returnable within thirty days, unless otherwise specially directed.

XXX. The rules and practice of this court respecting appeals, shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

XXXI. The writ shall not be allowed after the lapse of one year from the date of the judgment, order or decree, which is sought to be renewed, except under special circumstances.

XXXII. When causes are placed upon the calendar, parties shall be primarily liable for costs, as follows: 1. If by the appellant, he shall first be liable. 2. If by the respondent, or by consent, then both parties. In no civil case shall the clerk be required to remit the final papers until his costs are paid.

It is ordered that the foregoing be adopted, and that all preceding rules be abolished.

I, CHARLES S. FAIRFAX, clerk of the supreme court of the state of California, do certify the foregoing to be a true copy of the rules of the supreme court of the state of California, adopted May 21st, 1859.

CHARLES S. FAIRFAX, *Clerk.*

RULE BY THE CLERK.

In future, no transcript of record from a lower court will be filed in the supreme court unless accompanied by thirty dollars in cash.

C. S. F.

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THESE NUMBERS REFER TO SECTIONS.

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